REPORTS OF CASES

DECIDED BETWEEN

JULY 28, 1989 and DECEMBER 7, 1989

IN THE

Supreme Court of Nebraska

VOLUME CCXXXIII

STEVEN R. SCHROEDER

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By Steven R. Schroeder, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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[1]Appointed September 1, 1989

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Robert T. Finn	Tecumseh
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
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		James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
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		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Cedar, Dakota, and Dixon	Robert E. Otte	Dakota City
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Buffalo and Sherman	Dewayne Wolf	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	John P. Murphy Donald E. Rowlands II	North Platte North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Jack H. Hendrix	McCook
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	Edward E. Hannon	O'Neill
Sixteenth	Box Butte, Dawes, Grant, Morrill, Sheridan, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Gage and Jefferson	William B. Rist	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, Garden, and Kimball	John D. Knapp	Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Ronald D. Olberding	Burwell
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	John C. Whitehead John M. Brower	Columbus Fullerton

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Thomas J. Gist	Falls City
Second	Cass, Otoe, and Sarpy	Jeffrey L. Campbell	Papillion
		Albert C. Walsh	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Janice L. Gradwohl	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		John J. McGrath	Omaha
		Joseph S. Troia	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Everett O. Inbody	Wahoo
Sixth	Burt, Dodge, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	J. Patrick McArdle	Wilber
		Daniel Bryan, Jr.	Geneva
Eighth	Cedar, Dakota, Dixon, and Thurston	Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington

JUDICIAL DISTRICTS AND COUNTY JUDGES

Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn Philip R. Riley	Neligh Creighton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Harry C. Haverly Jack Robert Ott	Hastings Hastings
Eleventh	Hall and Howard	Richard E. Weaver David A. Bush	Grand Island Grand Island
Twelfth	Buffalo and Sherman	John P. Icenogle	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd G. Kaufman Kristine R. Cecava James M. O'Rourke	Lexington Ogallala North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Cloyd Clark B. Bert Leffler	McCook Benkelman
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	August F. Schuman Alan L. Brodbeck	Ainsworth O'Neill
Sixteenth	Box Butte, Dawes, Grant, Sheridan, and Sioux	Glen A. Fiebig James T. Hansen	Alliance Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff	James L. Macken G. Glenn Camerer	Gering Gering
Eighteenth	Gage and Jefferson	Steven Bruce Timm	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, and Kimball	Thomas H. Dorwart C. G. Wallace	Sidney Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Keith J. Kovanda Robert E. Wheeler	Burwell Broken Bow
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 85-610: **Lincoln Production Credit Assn. v. Brauer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-787: **The Federal Land Bank of Omaha v. Walker.** Stipulation allowed; appeal dismissed.

No. 87-224: **Hardin v. Rierden.** Stipulation to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. 87-428: **Witherspoon v. Sides Construction.** Stipulation allowed; appeal dismissed.

No. 87-510: **Production Credit Assn. v. Hoeting.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-981: **Loos v. Department of Social Services.** Stipulation allowed; appeal dismissed.

No. 87-1099: **King v. Plunkett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-043: **K N Energy v. City of Edgar.** Stipulation allowed; appeal dismissed.

No. 88-106: **Krolikowski v. Krolikowski.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-260: **Scottsbluff National Bank v. Foos.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-370: **Terry v. Terry.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-518: **LaChateau de Coshons v. Jacobs.** Stipulation allowed; appeal dismissed.

No. 88-546: **In re Estate of Driskell.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-553: **Van Valkenburg v. Pioneer Land Improvement, Inc.** Stipulation allowed; appeal dismissed.

No. 88-568: **Andelt v. Beasley.** Stipulation allowed; appeal

dismissed; each party to pay own costs.

No. 88-596: **LaChateau de Coshons v. Jacobs.** Stipulation allowed; appeal dismissed.

No. 88-637: **Cottam v. Cottam.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-644: **Jacobs v. LaChateau de Coshons.** Stipulation allowed; appeal dismissed.

No. 88-670: **Corfield v. Emerson Electric Co.** Motion and stipulation to dismiss appeal sustained; appeal dismissed.

No. 88-773: **In re Estate of Watkins.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-846: **LaChateau de Coshons v. Jacobs.** Stipulation allowed; appeal dismissed.

No. 88-889: **Peterson v. Lopez.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-958: **Cidlik v. Cidlik.** Stipulation allowed; appeal dismissed.

No. 88-959: **Travelers Ins. Co. v. Nelson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1010: **Brown v. Charles Sargent Irrigation.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-1071: **State v. Taylor.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 88-1083: **State v. Brown.** Affirmed. See Rule 7A(1).

No. 89-001: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-023: **State v. Brega.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-026: **West Town Homeowners v. Schneider.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-031: **State v. Burgess.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-033: **CVN Companies, Inc. v. Bob Cummins Enterprises, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-044: **Federal Land Bank v. Germer.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-057: **Jecha v. Vavra.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-068: **State v. Kitt.** By order of the court, appeal dismissed as moot.

No. 89-072: **Jacox v. Spivak.** Stipulation allowed; appeal dismissed.

No. 89-074: **State v. Mahlberg.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-092: **Ponec v. Ponec.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-098: **State v. Todd.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-118: **State v. Davenport.** Affirmed. See Rule 7A(1).

No. 89-128: **Swanson v. Swanson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-146: **Graber v. Graber.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-150: **City of LaVista v. Long.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-156: **Briarhurst West Neighborhood Assn. v. Boggs.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-158: **Burkey v. Burkey.** Motion sustained; appeal dismissed.

No. 89-177: **Thrasher v. Smith Laboratories, Inc.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-180: **Byars v. CNA-Fruehauf.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-184: **State v. Peterson.** Affirmed. See Rule 7A(1).

No. 89-188: **State v. Hartmann.** By order of the court, appeal dismissed as moot.

No. 89-193: **Brott v. Simon.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-197: **State v. Peterson.** Affirmed. See Rule 7A(1).

No. 89-201: **State v. Rabago.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

Nos. 89-210, 89-211, 89-212, 89-213: **State v. Bean.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-223: **State v. Golle.** Affirmed. See Rule 7A(1).

No. 89-238: **Troia v. Steak & Ale.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-304: **State v. Conatella.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-307: **State v. Myre.** Motion of appellee for summary affirmance sustained; jugment affirmed; see Rule 7B(2).

No. 89-311: **State v. Atkinson.** Affirmed. See Rule 7A(1).

No. 89-314: **State v. Clark.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-315: **Mark v. Green.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-319: **State v. Keck.** Affirmed. See Rule 7A(1).

No. 89-320: **State v. Nottlemann.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-325: **State v. Achziger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-326: **State v. Beck.** Affirmed. See Rule 7A(1).

No. 89-332: **Stanko v. Stanko.** Stipulation to remand cause to district court for further action sustained.

No. 89-333: **Stanko v. Stanko.** Stipulation to remand cause to district court for further action sustained.

No. 89-342: **Hulac, Inc. v. Ueding.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-344: **State v. Hubbard.** Affirmed. See Rule 7A(1).

No. 89-346: **State v. Vrtatko.** Affirmed. See Rule 7A(1).

No. 89-348: **State v. Williamson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-349: **State v. Williamson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-350: **Bode v. James E. Simon Co.** Motion of

appellant to dismiss appeal sustained; appeal dismissed.

No. 89-355: **State v. Griffin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-356: **State v. Porter.** Affirmed. See Rule 7A(1).

No. 89-365: **State v. Yager.** Affirmed. See Rule 7A(1).

No. 89-372: **State v. Thulin.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-374: **Norwest Bank Nebraska v. Friborg.** Stipulation allowed; appeal dismissed with prejudice.

No. 89-375: **State v. Humphrey.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-378: **Department of Health v. Engen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-379: **State v. Goings.** Affirmed. See Rule 7A(1).

No. 89-383: **Studebaker v. Studebaker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-386: **State v. Hicks.** Appeal dismissed. See Rule 7A(2).

No. 89-390: **State v. Sheldon.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-392: **Burton v. United of Omaha Life Ins.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

Nos. 89-396, 89-397: **State v. Graham.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-404: **In re Estate of Sim.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-407: **State v. Johnson.** Affirmed. See Rule 7A(1).

No. 89-408: **State v. Brothwell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-417: **State v. Jenkins.** Affirmed. See Rule 7A(1).

No. 89-419: **State v. Bicking.** Appeal dismissed. See Rule 7A(2).

No. 89-420: **State v. Rogers.** Motion of appellee for

summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-421: **State v. Kennedy.** Affirmed. See Rule 7A(1).

No. 89-422: **State v. Broadstone.** Affirmed. See Rule 7A(1).

No. 89-423: **Myers v. Lewis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-430: **State v. Trejo.** Affirmed. See Rule 7A(1).

No. 89-431: **State v. Alire.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-432: **State v. Ritter.** Motion of appellee for summary affirmance sustained; jugment affirmed; see Rule 7B(2).

No. 89-433: **State v. Uecker.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-438: **Thomas v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-441: **State v. Wagner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-443: **In re Estate of Morgan.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-446: **State v. Bittner.** Stipulation allowed; appeal dismissed.

No. 89-449: **Keane v. Keane.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-450: **Hobbs v. Schaffer.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-459: **State v. Little Thunder.** Affirmed. See Rule 7A(1).

No. 89-460: **State v. Little Thunder.** Affirmed. See Rule 7A(1).

No. 89-461: **Ecabert v. Ecabert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-467: **Madden v. List.** Stipulation allowed; appeal dismissed.

No. 89-468: **State v. Baustian.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-470: **State v. Hamburger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 89-471: **Heritage of Bridgeport v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-474: **Cole v. Tussing.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-476: **Nwoke v. Brannon.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-480: **State v. McBride.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-493: **State v. Campbell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-497: **Burhoop v. Burhoop.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-504: **State v. Sheeks.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-505: **In re Interest of Dedrick.** Stipulation allowed; appeal dismissed.

No. 89-509: **State v. Tankersley.** Affirmed. See Rule 7A(1).

No. 89-510: **Cloverlodge Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-511: **Terrace Hill Manor v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-512: **Fremont Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-513: **Kinder Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-514: **Heritage of Bel-Air v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-515: **Milder Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-516: **Sprague Nursing Home v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-517: **Heritage of David City v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-518: **Heritage of Fairbury v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-519: **Heritage Health Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-520: **St. Joseph Gerontology Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-521: **Archbishop Bergan Mercy Hospital v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-522: **Hooper Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-523: **County of Lancaster v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-524: **Memorial Hospital v. Department of Administrative Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-525: **Heritage Living Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-526: **Colonial Acres Nursing Home v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-527: **Our Lady of Lourdes Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-528: **Beatrice Community Hospital and Health Center, Inc. v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of

a final order.

No. 89-529: **Good Shepherd Lutheran Home v. Department of Administrative Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-530: **Lutheran Community Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-531: **Community Memorial Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-532: **Tri-County Area Hospital District v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-533: **The Community Hospital Association v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-534: **Cheyenne County Hospital Association, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-535: **Perkins County Community Hosp. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-536: **Henderson Community Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-537: **Bishop Clarkson Memorial Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-538: **Nebraska Psychiatric Institute v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-539: **The University Hospital Hillcrest Nursing Home v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-540: **Richard Young Memorial Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-541: **Lutheran General Hospital v. Department of**

Social Services. No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

Nos. 89-542 to 89-553: **Bethesda Foundation v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 89-554 to 89-578: **Evangelical Lutheran Good Samaritan Society v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-579: **Bryan Memorial Hospital v. Department of Social Services.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-580: **Arbor Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-581: **Platte Valley Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-582: **Platte Valley Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-583: **City of Bayard v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-584: **Matney's Colonial Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-585: **City of Laurel v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-586: **Crowell Memorial Home v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-587: **Heritage of North Platte v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-588: **Tabitha, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-589: **St. Joseph's Nursing Home, Inc. v. Department**

of Social Services. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-590: **Golden Five, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-591: **City of Lincoln v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-592: **Immanuel Medical Center v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-593: **Martin Luther Home Society, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-594: **City of Imperial v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-595: **City of Crawford v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-596: **Village Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-597: **The Lutheran Home v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-598: **American Baptist Homes of the Midwest v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-599: **Frenchman Valley Development Corporation v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-600: **Mid America Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-601: **Sarah Ann Hester Memorial Home v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-602: **Slack Nursing Home, Inc. v. Department of**

Social Services. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-603: **Elms Health Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-604: **Village of Verdigre v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-605: **Blue Valley Lutheran Home Society, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-606: **Christian Homes, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-607: **Pawnee Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-608: **Pierce Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-609: **Village of Bemer v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-610: **Village of Coleridge v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-611: **Bethphage Mission, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-612: **Bethphage Mission, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-613: **City of Fairmont v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-614: **Village of Greeley v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-615: **City of Wilber v. Department of Social Services.**

Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-616: **City of Oakland v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-617: **City of Madison v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-618: **County of Kimball v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-619: **City of Rushville v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-620: **City of Stanton v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-621: **Methodist Memorial Homes, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-622: **Valley View of North Platte, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-623: **Hillcrest Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-624: **Papillion Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-625: **Logan Valley Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-626: **Nebraska Nursing Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-627: **Ketter Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-628: **Sutton Community Home Corporation v.**

Department of Social Services. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-629: **Village of Stuart v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-630: **County of Garden v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-631: **County of Garden v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-632: **Friendship Villas Ltd., Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-633: **Heritage of Geneva, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-634: **North Bend Senior Citizens Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-635: **K.S.R.C., Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-636: **Mother Hull Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-637: **Regal Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-638: **Beatrice Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-639: **Midland Villa Nursing Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-640: **Village of Trenton v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-641: **County of Red Willow v. Department of Social**

Services. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-642: **Crete Nursing Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-643: **Schmalenbach v. Allied Insurance Group.** Motion sustained; appeal dismissed.

No. 89-644: **Rosberg v. Jacob.** By order of the court, case dismissed for want of prosecution.

No. 89-645: **Kossack v. Kossack.** Stipulation allowed; appeal dismissed.

No. 89-646: **State v. Eucker.** Affirmed. See Rule 7A(1).

No. 89-648: **Miller v. Millerville Ranch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-652: **State v. Synowiecki.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-654: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-659: **State v. Garrett.** Affirmed. Grant, Judge.

No. 89-662: **State v. Brewer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-666: **State v. Proctor.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-667: **J.D. Partnership v. County of Douglas.** Joint motion for dismissal sustained; appeal dismissed with prejudice.

No. 89-668: **Liesche v. County of Douglas.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-669: **State v. Moss.** Affirmed. See Rule 7A(1).

No. 89-671: **Stennis v. Nelson & Harding.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-674: **Kitt v. Clark.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 89-679: **State v. Robertus.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 89-683: **Bockhahn v. City of Grand Island.** Stipulation allowed; appeal dismissed.

No. 89-687: **State v. Friis.** Affirmed. See Rule 7A(1).

No. 89-688: **EMM Company v. H & H Transmissions.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-689: **Tucker v. Tucker.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-694: **Stanko v. Stanko.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 89-695: **Citizens State Bank v. KO Limited Partnership.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-696: **State v. Cook.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-699: **State v. Block.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-701: **Kostolich v. Sherwood Homes, Inc.** Stipulation allowed; appeal dismissed.

No. 89-702: **State v. Dack.** Affirmed. See Rule 7A(1).

Nos. 89-703, 89-704: **State v. Sterba.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-706: **State v. Little.** Affirmed. See Rule 7A(1).

No. 89-709: **First United Bank of Bellevue v. Pelton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-715: **State v. Cisneros.** Affirmed. See Rule 7A(1).

No. 89-717: **State v. Rodriguez.** Affirmed. See Rule 7A(1).

No. 89-718: **Kitt v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 89-720: **Kong-Boonrod v. Moon.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 89-723: **Feik v. Feik.** Stipulation allowed; appeal dismissed.

No. 89-726: **State v. Van DeMark.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-727: **State v. Colby.** Motion of appellee for summary

affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-741: **State v. Scott.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-742: **State v. Santee.** Affirmed. See Rule 7A(1).

No. 89-749: **State v. Jones.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-752: **State v. Messersmith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-757: **Hasselmann v. Hasselmann.** Stipulation allowed; appeal dismissed.

No. 89-760: **State v. Matthews.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-778: **State v. Hill.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-787: **State v. Gardner.** Affirmed. See Rule 7A(1).

No. 89-788: **State v. Strickland.** Affirmed. See Rule 7A(1).

No. 89-801: **State v. Royal.** Motion of appellee for summary affirmance sustained; see Rule 7B(2).

No. 89-813: **Bryant v. Owen.** Stipulation allowed; appeal dismissed.

No. 89-822: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-827: **Armstrong v. State of Nebraska.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-841: **Weiner v. Ancona Bros.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

Nos. 89-854, 89-855, 89-856: **In re Conservatorship of Parkos.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-884: **First National Bank v. Baker.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-1015: **First National Bank Holdrege v. Board of Equal.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1162: **Morrison v. The Seamless Raingutter Co.** Stipulation allowed; appeal dismissed.

No. 89-1176: **Adams Bank & Trust v. United Fire & Casualty Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-1190: **Wilson v. Wilson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1201: **Atlas Engineering Co. v. American National Bank.** By order of the court, appeal dismissed pursuant to order to show cause dated September 26, 1989.

No. 89-1216: **State v. Harbour.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-1237: **Kitt v. Lamb.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-1255: **Freezer Services, Inc. v. Waller.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-1261: **Mundt v. City of Alliance.** Stipulation allowed; appeal dismissed.

No. 89-1283: **Hogan v. Malashock.** Stipulation allowed; appeal dismissed.

No. 89-1319: **Ameritrade, Inc. v. Perelman-Carley & Assoc.** Stipulation allowed; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BERNARD ODDO, APPELLEE, V. SPEEDWAY SCAFFOLD COMPANY, APPELLEE, CONTRACTOR ASSOCIATES, INC., APPELLANT.

443 N.W.2d 596

Filed July 28, 1989. No. 87-875.

1. **Agency: Words and Phrases.** An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act.
2. **Principal and Agent.** The scope of an agent's authority is a question of fact.
3. **Principal and Agent: Words and Phrases.** In the relationship of principal and agent, an agent's actual authority is the power to act on the principal's behalf in accordance with the principal's consent to the agency.
4. **Contracts.** One who signs a document without reading it cannot later avoid the effect of the signed document by claiming lack of knowledge concerning the document's contents.
5. **Workers' Compensation: Liability: Contracts.** When an employer, liable to an employee under the Nebraska Workers' Compensation Act, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the Workers' Compensation Act does not preclude the third party's action to enforce the indemnity agreement with the indemnitor-employer.
6. **Contracts: Words and Phrases.** An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts.
7. **Contracts: Negligence: Intent.** An indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.
8. **Contracts: Negligence.** Neb. Rev. Stat. § 48-425 (Reissue 1988) does not preclude indemnification against a breach of the statutory duty concerning scaffolding.
9. **Contracts: Damages: Trial.** A factual question concerning damages recoverable in an action on an indemnity agreement, whether such question involves causation or amount of damages, is a matter for the fact finder.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Richard L. Walentine and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Michael F. Kinney, of Cassem, Tierney, Adams, Gotch & Douglas, and Michael E. Waldeck and Randa Rawlins, of Niewald, Waldeck, Norris & Brown, for appellee Speedway Scaffold.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

SHANAHAN, J.

As the result of a bench trial, Speedway Scaffold Company (Speedway) recovered a judgment against Contractor Associates, Inc. (Contractor), for $1,114,989.10 based on an indemnity agreement. Contractor appeals and claims that the district court erred in finding that Speedway was entitled to contractual indemnity, and in finding that Contractor was liable to pay an attorney fee for counsel representing the insurance carrier for Speedway's excess coverage.

STANDARD OF REVIEW

In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the evidence in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988); *Alliance Nat. Bank v. State Surety Co., supra*; *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988).

FACTS

Since 1979, Contractor, a masonry contractor, periodically leased scaffolding equipment from Speedway. When Contractor needed scaffolding, its president, Jesse Sutton,

contacted Speedway and ordered scaffolding, which was delivered to the site of Contractor's work. On delivery of scaffolding, Speedway required the signature of a Contractor employee on a written lease and retained the signed original of the lease. Contractor received a copy of the signed lease. Although Speedway sometimes erected scaffolding for other customers, Contractor usually erected the scaffolding by itself.

If Contractor failed to return all the scaffolding at the end of the lease, Speedway continued to charge Contractor rent for the unreturned equipment. However, if Contractor informed Speedway that Contractor would keep the equipment, Speedway billed Contractor for the price of the equipment retained.

In October 1980, Speedway revised the form of its standard lease and used the new form in all lease transactions from that time. The front of the lease form reflected the lessee's name, the type and amount of scaffolding involved, the date when the scaffolding was ordered, and the location where the scaffolding was delivered. The front of the form also had a place for a signature underneath the words "Received Equipment In Good Order and Subject to Conditions of Rental By [blank line]." Immediately beneath the signature line the following was printed in bold uppercase letters: "NOTE: SEE REVERSE SIDE FOR TERMS AND CONDITIONS OF LEASE. ALL WARRANTIES DISCLAIMED." The reverse side of Speedway's revised form contained 18 numbered paragraphs expressing conditions of the lease. Most of the paragraphs were in standard type, with conventional upper and lowercase letters. However, at the center of the reverse side, in uppercase bold print, the following appeared:

> 11. INDEMNIFICATION: LESSEE SHALL INDEMNIFY AND DEFEND LESSOR AGAINST AND HOLD LESSOR HARMLESS FROM ANY AND ALL CLAIMS, ACTIONS, SUITS, PROCEEDINGS, COSTS, EXPENSES, DAMAGES AND LIABILITIES, INCLUDING ATTORNEY'S FEES WHICH:
>
> (1) RELATE TO INJURY OR TO DESTRUCTION OF PROPERTY, OR BODILY INJURY, ILLNESS, SICKNESS, DISEASE OR DEATH OF ANY PERSON

(INCLUDING EMPLOYEES OF LESSEE), AND;

(2) ARE CAUSED, OR CLAIMED TO BE CAUSED, IN WHOLE OR IN PART BY THE EQUIPMENT LEASED HEREIN OR BY THE LIABILITY OR CONDUCT (INCLUDING ACTIVE, PASSIVE, PRIMARY OR SECONDARY) OF LESSOR, ITS AGENTS OR EMPLOYEES, OR ANYONE FOR WHOSE ACTS ANY OF THEM MAY BE LIABLE. THE PARTIES AGREE THAT LESSOR SHALL ONLY BE LIABLE OR RESPONSIBLE FOR ACTIONS OF WILFUL MISCONDUCT.

LESSEE SHALL, AT ITS OWN COST AND EXPENSE, DEFEND LESSOR AGAINST ALL SUITS OR PROCEEDINGS COMMENCED BY ANYONE IN WHICH LESSOR IS NAMED A PARTY FOR WHICH LESSOR IS ALLEGED TO BE LIABLE OR RESPONSIBLE AS A RESULT OF OR ARISING OUT OF THE EQUIPMENT OR ANY ALLEGED ACT OR OMISSION BY LESSOR, AND LESSEE SHALL BE LIABLE AND RESPONSIBLE FOR ALL COST, EXPENSES AND ATTORNEY'S FEES INCURRED IN SUCH DEFENSE AND/OR SETTLEMENT, JUDGMENT OR OTHER RESOLUTION. IN THE EVENT THAT SUCH ACTION IS COMMENCED NAMING LESSOR AS A PARTY, LESSOR MAY ELECT TO DEFEND ACTION ON ITS OWN BEHALF AND LESSEE AGREES THAT IT SHALL BE LIABLE FOR ALL COSTS, EXPENSES AND ATTORNEY'S FEES INCURRED BY LESSOR IN SUCH DEFENSE.

PURPOSE OF THIS CLAUSE: IT IS THE PURPOSE OF THIS CLAUSE TO SHIFT THE RISK OF ALL CLAIMS RELATING TO THE LEASED PROPERTY TO THE LESSEE DURING THE ENTIRE TERM OF THIS LEASE.

Contractor kept all its copies of Speedway leases in a folder at Contractor's office, where the leases were available for review if needed or desired. On various occasions, Sutton had seen the Speedway leases and read some of the provisions on the back of the lease forms, although he did not recall having read

the indemnity provision contained in paragraph 11 on the reverse side of each Speedway lease. However, Sutton understood the concept and consequences of indemnity. All Contractor employees at the jobsite were authorized to sign the lease form which accompanied scaffolding deliveries from Speedway. Sutton never informed Speedway that Contractor would not accept the indemnity provision in Speedway's leases and never limited the authority of Contractor employees to sign a lease, which always accompanied scaffolding deliveries from Speedway.

After 2 years of periodic leasing from Speedway pursuant to the lease form revised in 1980, Sutton called Speedway on November 17, 1982, and ordered scaffolding under a lease, which was to be delivered by Speedway and erected by Contractor at its jobsite. Speedway delivered the scaffolding as requested. Although the signature on the lease form which accompanied the order is somewhat illegible, Sutton acknowledged that the signature "looks like it was Harvey Cowan," a mason tender for Contractor, who signed the lease bearing the acknowledgment that Cowan had received the scaffolding subject to the conditions on the reverse side of the form.

On November 18, 1982, some of Speedway's scaffolding, which was delivered on November 17, collapsed on account of a failure in the material brackets for the scaffolding and injured Bernard Oddo, one of Contractor's employees. Evidence indicated that Contractor, sometime after November 18, purchased from Speedway the material brackets which were found to be defective. Oddo sued Speedway for negligence and joined Contractor pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1988) to determine Contractor's subrogation interest as the result of workers' compensation benefits paid to Oddo. On the basis of the indemnity agreement in the scaffolding lease, Speedway cross-petitioned against Contractor and sought indemnification for any loss sustained as the result of Oddo's claim.

Two law firms participated in Speedway's defense to Oddo's action. Cassem, Tierney, Adams, Gotch & Douglas of Omaha represented Speedway's primary liability insurance carrier,

Western Insurance Company, which supplied coverage with a $500,000 limit. Niewald, Waldeck, Norris & Brown of Kansas City, Missouri, represented Speedway's excess insurance carrier, Stonewall Insurance Company. Expert testimony showed that separate representation by the two insurance companies was necessary because conflicts between the companies' interests might develop during the litigation. An expert testified that the effort expended on the case and the fees charged by the Niewald, Waldeck firm were fair and reasonable.

Eventually, Speedway settled with Oddo for $1,033,073.82 and incurred attorney fees and other expenses of $81,915.28, including Niewald, Waldeck's fee of $23,203.21, in defense of Oddo's claim. The district court awarded Speedway $1,114,989.10 in its cross-petition against Contractor, the combined amounts of the Oddo settlement and the costs of defense.

COWAN'S SIGNATURE AND AUTHORITY

Contractor argues that the court erred in finding that Cowan signed the lease for the scaffolding involved in the Oddo accident and in finding that Cowan had authority to bind Contractor to the indemnity provision in the Speedway lease.

Regarding the signature attributable to Cowan as an employee of Contractor, Sutton acknowledged that the signature appeared to be Cowan's. Contractor presented no evidence that Cowan did not sign the lease. The evidence supports the district court's factual conclusion that Cowan signed the Speedway lease.

"An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act." *Dunn v. Hemberger*, 230 Neb. 171, 180, 430 N.W.2d 516, 522 (1988).

The scope of an agent's authority is a question of fact. *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986); *T. S. McShane Co. v. Great Lakes Pipe Line Co.*, 156 Neb. 766, 57 N.W.2d 778 (1953). In the relationship of principal and agent, an agent's actual authority is the power to act on the principal's behalf in accordance with

the principal's consent to the agency. See *Farmers Union Coop Assn. v. Commercial State Bank*, 187 Neb. 376, 191 N.W.2d 168 (1971).

Sutton admitted that Cowan had authority to sign documents on behalf of Contractor. Speedway required that its lease form, accompanying any scaffolding ordered, be signed by the recipient when the scaffolding was delivered, which was a longstanding practice between Speedway and Contractor. Thus, evidence supports the factual conclusion that Cowan signed the lease with authority from Contractor. Moreover, Contractor, through Sutton, had ample opportunity to read Speedway's leases before Cowan signed the lease which is the subject of this litigation. One who signs a document without reading it cannot later avoid the effect of the signed document by claiming lack of knowledge concerning the document's contents. *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986); *Universal Surety Co. v. Jed Constr. Co., Inc.*, 200 Neb. 712, 265 N.W.2d 219 (1978). For that reason, the court did not err in its finding that Cowan signed the lease with authority to bind Contractor to the indemnity provision contained in the signed lease.

WORKERS' COMPENSATION AND INDEMNITY

Contractor claims that Neb. Rev. Stat. § 48-148 (Reissue 1988) of the Nebraska Workers' Compensation Act bars Contractor's liability under the indemnity agreement in the Speedway lease. Section 48-148 states:

> If any employee, or his or her dependents in case of death, of any employer subject to the Nebraska Workers' Compensation Act files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the Nebraska Workers' Compensation Court under such act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

In *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988), Union Pacific sued Kaiser to

recover under an indemnity agreement for Union Pacific's settlement of a negligence claim by a Kaiser employee, who had received workers' compensation benefits from Kaiser. Kaiser argued that the Nebraska Workers' Compensation Act precluded an employer's contractual liability for indemnification of a tortious third party (Union Pacific) on account of payments made to Kaiser's employee in settlement of the tort claim against Union Pacific. This court rejected Kaiser's argument:

> We find nothing in the Nebraska Workers' Compensation Act, by express provision or implication, and nothing in the public policy of the State of Nebraska, which prevents an employer's contractual obligation to indemnify a third party concerning a loss sustained through the third party's payments to the indemnitor's employee. Therefore, we now hold that when an employer, liable to an employee under the Nebraska Workers' Compensation Act, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the Workers' Compensation Act does not preclude the third party's action to enforce the indemnity agreement with the indemnitor-employer. The Union Pacific-Kaiser agreement contains no specific provision or language which excludes, exempts, or exonerates Kaiser from liability for indemnification or contribution as a contractual duty. We decline to rewrite the agreement between Union Pacific and Kaiser and insert a contractual provision precluding Kaiser's liability for indemnification or contribution concerning Union Pacific's settlement with Kaiser's employee, Blomenkamp. Kaiser's claim that the Nebraska Workers' Compensation Act provides exclusive liability and, therefore, immunizes Kaiser from Union Pacific's action to enforce the agreement for indemnification or contribution is without merit.

229 Neb. at 169-70, 425 N.W.2d at 879.

The indemnity agreement between Speedway and Contractor, expressed in paragraph 11 of the scaffolding lease,

contains no specific provision or language which excludes, exempts, or exonerates Contractor from indemnification as a contractual duty. See *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., supra.*

Nevertheless, Contractor maintains that the language in the indemnification clause of Speedway's lease is unclear and an ineffective circumvention of the exclusivity otherwise attendant to claims governed by the Nebraska Workers' Compensation Act, and which, Contractor argues, allows Speedway's indemnity recovery for its own negligence.

"An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts." *Union Pacific RR. Co., supra* at 170, 425 N.W.2d at 879. See, also, *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc.*, 191 Neb. 50, 213 N.W.2d 731 (1974); *First Trust Co. v. Airedale Ranch & Cattle Co.*, 136 Neb. 521, 286 N.W. 766 (1939). " 'An indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.' " *Omaha P. P. Dist. v. Natkin & Co.*, 193 Neb. 518, 522, 227 N.W.2d 864, 867 (1975) (quoting *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc., supra*).

The indemnity clause in the Speedway lease provided that Contractor would indemnify Speedway for claims arising out of Speedway's "CONDUCT (INCLUDING ACTIVE, PASSIVE, PRIMARY OR SECONDARY)." In addition, the clause stated that the "LESSOR SHALL ONLY BE LIABLE OR RESPONSIBLE FOR ACTIONS OF WILFUL MISCONDUCT." Finally, the lease declared that the purpose of the indemnity clause was "TO SHIFT THE RISK OF ALL CLAIMS RELATING TO THE LEASED PROPERTY TO THE LESSEE DURING THE ENTIRE TERM OF THIS LEASE." Although the lease's indemnity clause does not contain the word *negligence*, the intended consequence of indemnity is expressed clearly and unequivocally—Contractor was obligated to indemnify Speedway concerning claims arising from Speedway's conduct, including negligence, but excluding claims based on Speedway's willful misconduct.

STATUTORY LIABILITY FOR SCAFFOLDS

Contractor asserts that its agreement to indemnify Speedway is unenforceable to the extent that Contractor has agreed to indemnify Speedway for a breach of Speedway's duty under Neb. Rev. Stat. § 48-425 (Reissue 1988), which provides:

> All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner. Scaffolding or staging, swung or suspended from an overhead support and more than twenty feet from the ground floor, shall have, where practicable, a safety rail properly bolted, secured and braced, rising at least thirty-four inches above the floor or main portion of such scaffolding or staging, and extending along the entire length of the outside and ends thereof and properly attached thereto, and such scaffolding and staging shall be so fastened as to prevent the same from swaying from the building or structure.

As a result of § 48-425, one who erects, constructs, maintains, or supplies scaffolding must see that the scaffolding is erected and constructed in a safe, suitable, and proper manner. *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973). Breach of the duty imposed by § 48-425 constitutes negligence per se, not merely evidence of negligence. *Johnson v. Weborg*, 142 Neb. 516, 7 N.W.2d 65 (1942). See, also, *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N.W. 393 (1938); *Stevens v. Luther*, 105 Neb. 184, 180 N.W. 87 (1920).

Speedway, as a supplier of scaffolding, had a duty to supply scaffolding constructed in a "safe, suitable and proper manner." However, notwithstanding the duty imposed by § 48-425, Speedway could obtain indemnification against a breach of its duty, that is, Speedway may, and did, contract for indemnification against its own negligence regarding a scaffold which it supplied. See, *Omaha P. P. Dist. v. Natkin & Co.*, *supra*; *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc.*, *supra*. Under the circumstances of this case, nothing precludes

contractual indemnification simply because Speedway's loss, for which it sought indemnification from Contractor, may have arisen out of the breach of a statutory duty rather than breach of a duty at common law. Thus, § 48-425 does not preclude indemnification against a breach of the statutory duty concerning scaffolding.

LEASE OR SALE

Contractor argues that the defective material brackets which caused the Oddo accident were not covered by the lease agreement because Contractor eventually purchased the brackets. The uncontroverted evidence shows that the brackets were originally leased from Speedway and remained as parts of the leased equipment until Contractor informed Speedway that Contractor wished to purchase the brackets after the Oddo accident. There is no evidence that Contractor made any attempt to purchase the brackets before Oddo's accident. Contractor's argument regarding the defective material brackets has no support in the record and is entirely without merit.

ATTORNEY FEE

Finally, Contractor contends that it is not liable for the attorney fee of Niewald, Waldeck, which, Contractor argues, had no part in achieving the settlement with Oddo, since Speedway was already represented by the attorneys for Speedway's primary liability insurance carrier. Speedway's lease to Contractor states that, regarding defense of an action against the lessor, the lessee "SHALL BE LIABLE FOR ALL COSTS, EXPENSES AND ATTORNEY'S FEES INCURRED BY LESSOR IN SUCH DEFENSE." A factual question concerning damages recoverable in an action on an indemnity agreement, whether such question involves causation or amount of damages, is a matter for the fact finder. See *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976). See, also, *Bankers Surety Co. v. Cross*, 100 Neb. 98, 158 N.W. 457 (1916). Contractor's claim regarding the attorney fee in this case is without merit.

CONCLUSION

The judgment for Speedway Scaffold Company is supported by the evidence and is, therefore, affirmed.

AFFIRMED.

HEESE PRODUCE COMPANY, APPELLANT, V. ROBERT LUEDERS, APPELLEE.

HEESE PRODUCE COMPANY, APPELLANT, V. DAVID LUEDERS, APPELLEE.

443 N.W.2d 278

Filed July 28, 1989. Nos. 87-978, 87-979.

1. **Contracts: Compromise and Settlement.** A settlement agreement is subject to the general principles of contract law.
2. **Appeal and Error.** In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
3. **Contracts: Evidence.** Neb. Rev. Stat. § 7-107(2) (Reissue 1987) does not make an oral contract invalid, but only relates to the character of evidence by which it may be established.
4. **Evidence: Appeal and Error.** It is incumbent on one, not wishing to be bound by evidence made incompetent by statute, to make timely objection when it is offered. It is too late to raise the objection for the first time in the appellate court.
5. **Statute of Frauds: Debtors and Creditors: Consideration.** Where the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the promise is made on sufficient consideration, it will be valid although not in writing.
6. _____: _____: _____. The consideration to support an oral promise to pay the debt of another must operate to the advantage of the promisor and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.
7. **Court Rules: Waiver.** In appropriate circumstances where no injustice would result, the district court may exercise its inherent power to waive its own rules.
8. **Contracts: Compromise and Settlement.** To have a settlement agreement, there must be a definite offer and an unconditional acceptance.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed.

Daniel A. Smith, of Stanek & Smith, for appellant.

Charles W. Balsiger, of Jewell, Gatz, Collins, Dreier, Fitzgerald & Balsiger, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

GRANT, J.

These are consolidated appeals from the district court for Thurston County. Plaintiff-appellant, Heese Produce Company (Heese), filed these actions in the Thurston County Court to collect accounts allegedly due from defendants-appellees, Robert Lueders (case No. 87-978) and David Lueders (case No. 87-979). Defendants each filed a cross-petition, alleging breach of express and implied warranty, negligence, and product liability in an amount exceeding the jurisdictional limit of the county court. The cases were certified to the district court pursuant to Neb. Rev. Stat. § 24-302.01 (Reissue 1985) and were set for trial on April 14, 1987. The district court was informed of a settlement, and the cases were continued.

On April 20, 1987, defendants each filed a "Motion to Confirm Settlement and Enter Judgment Thereon." After an evidentiary hearing on September 2, 1987, the district court sustained defendants' motions and dismissed Heese's petitions and defendants' cross-petitions, with prejudice.

Heese timely appealed to this court, contending the district court erred as a matter of law in finding the parties had entered into an enforceable compromise and settlement agreement and, therefore, in sustaining defendants' motions to confirm settlement and enter judgment thereon. We affirm.

The record shows that these actions were filed by Heese in the Thurston County Court on November 19, 1984, to collect an account allegedly due from Robert Lueders in the amount of $3,202.28 and an account allegedly due from David Lueders in the amount of $4,878.20. The petitions further alleged that the defendants each purchased, on account, chemical and fertilizer

products from Heese and that to secure the indebtedness Heese filed "Notices of Fertilizer Lien on Crops" with the county clerks of Thurston, Cuming, and Wayne Counties.

On March 28, 1985, with the permission of the county court, both defendants filed cross-petitions alleging breach of express and implied warranty, negligence, and product liability in connection with certain herbicides sold to them by Heese. In the cross-petitions, Robert Lueders sought $22,346.80 and David Lueders sought $21,847.92 from Heese "for loss of income due to the decreased yields on [Lueders'] various tracts of real estate, and for incidental and consequential damages." Since the cross-petitions exceeded the jurisdictional limit of the county court, the cases were certified to district court.

On February 26, 1987, defendants filed motions to set the two actions separately for jury trial. On March 12, 1987, the district court set the cases for trial on April 14. The court was informed of a settlement by letter dated March 30, 1987. Each defendant's "Motion to Confirm Settlement and Enter Judgment Thereon" was filed on April 20.

A hearing on the motions was held September 2, 1987. Defendants were represented by Charles Balsiger, and Heese was represented by Stuart Mills and Eric Kruger. Kruger told the court that he also appeared "by a special appearance only" on behalf of Tri-State Insurance Company (Tri-State), Heese's insurance carrier. There was no ruling on this special appearance.

Correspondence regarding the attempted settlement of these matters was admitted in evidence at the September 2 hearing, without objection. Balsiger's March 6, 1987, letter to Kruger and Mills proposed that Heese "dismiss the respective petitions with prejudice and deliver a release of the alleged lien as to each case. In consideration for that action the defendants will dismiss their respective causes of action with prejudice." Balsiger's notes regarding a telephone call from Mills on March 12 indicate that Mills offered "to settle with Lueders jointly for $5000." That is, Heese would settle its claims against both defendants for a payment of $5,000.

Kruger's March 19, 1987, letter to Balsiger and Mills pertaining to defendants' cross-petitions states:

> So that there is no misunderstanding, I am of the opinion that the $5,000.00 offered by my client exceeds the value of the counterclaim. This offer is being made, in no small part, based upon the realities of legal expenses going forward.
>
> Accordingly, if Tri-State Insurance Company is required to expend any additional costs in getting this matter ready for trial, the offer will be withdrawn.

Kruger's letter also bears a notation that a copy of the letter was sent to a litigation supervisor at Tri-State regarding its insured, Heese, and the claimants Lueders. The record does not show any communication from Tri-State which pertains to the settlement of Heese's claims against the defendants.

Balsiger and Mills continued settlement negotiations. By letter dated March 25, 1987, Balsiger rejected Mills' March 12 "counterproposal to settle [Heese's claims] in the amount of $5,000," and "submit[ted] a counteroffer to settle for the sum of $2,500.00 payable to Heese Produce forthwith for and in consideration of a dismissal of all claims by both parties against the other, costs taxed to the parties as respectively incurred. Also we would require a release of your crop liens."

Balsiger's notes of March 28, 1987, reflect two telephone conversations with Mills. During the earlier conversation, Mills counteroffered to settle Heese's claims against defendants for $3,000. After advising Robert Lueders of the $3,000 counteroffer, Balsiger telephoned Mills. Balsiger's notes of this conversation indicate that Balsiger "offered to settle at $2800 he accepted, we are to draw the paperwork."

Balsiger's March 30, 1987, confirming letter to Mills and Kruger stated as follows:

> This letter will confirm my telephone conferences with Mr. Stuart Mills on the morning of March 28, 1987, concerning settlement of the above referenced cases.
>
> It is our understanding these cases will be dismissed by Heese Produce Company with Prejudice, as to the accounts, and that in consideration of such a dismissal Robert and Dave Lueders shall pay to Heese Produce the sum of $2,800.00 and shall dismiss their counterclaims. In addition Heese Produce will provide a release for the

fertilizer liens claimed against the Lueders [sic].

Enclosed with the March 30 letter were a check from Robert Lueders payable to "Heese Produce & Stuart Mills" in the amount of $2,800, drafts of the documents required to dismiss both cases with prejudice, and draft releases of the fertilizer liens.

Also enclosed with the March 30 letter was a copy of Balsiger's March 30, 1987, letter to the court advising that the cases had been settled.

On April 3, however, Kruger wrote to Balsiger enclosing new drafts of the dismissal documents, a release, and "Tri-State's claim draft in the amount of $5,000.00 which is payable to both of your clients, yourself, and to Heese Produce." The form of release enclosed with Kruger's April 3 letter provided that in consideration of the sum of $5,000, David and Robert Lueders would "forever release, acquit and discharge" Heese from any claims arising out of damage to the Luederses' real property. In other words, the release drafted by Kruger contemplated that the defendants would dismiss their cross-petitions for a settlement of $5,000.

Each defendant's "Motion to Confirm Settlement and Enter Judgment Thereon" was filed on April 20, 1987. In these documents, the defendants alleged that Mills orally accepted their offer "to settle at $2,800.00, payable to [Heese] with mutual dismissals with prejudice and releases of claimed fertilizer liens, each party to pay their respective costs, counsel for the defendants to prepare settlement documents." The motions further alleged that defendants' counsel confirmed the settlement by letter and commenced performance of the settlement by tendering settlement documents and "settlement payment proceeds" of $2,800 to Mills. The motions also alleged:

> 11. That contemporaneously with, and during the same time that settlement negotiations between plaintiff and defendants was [sic] proceeding, the plaintiff's attorney Stuart Mills, on behalf of the plaintiff Heese Produce, was negotiating a separate matter with Eric Kruger, resulting in substance in an agreement whereby the insurance company insuring plaintiff would pay to plaintiff,

> defendants, and defendants' counsel, the sum of $5,000.00 to be endorsed over to plaintiff for and in consideration of the release and discharge of any claim of defendants set forth in defendants' cross-petitions. These negotiations were never disclosed to the defendants or their attorney until after the defendants and plaintiff had reached the settlement previously described in . . . this Motion. Upon disclosure, the latter proposal was rejected by the defendants as beyond the scope of the settlement previously reached with plaintiff.

At the September 2 hearing, the trial court also took judicial notice of an "Application" filed by Mills on August 17. The application sought orders compelling Tri-State to pay into the court the sum of $5,000 and compelling defendants to pay into court the total sum of $2,800, "which sums then should be paid to [Heese] in compromise and settlement of these cases." The application alleged:

> 1. On or about March 28, 1987, Plaintiff's insurance carrier, Tri-State Insurance, acting through its attorney, Eric Kruger, agreed to pay Plaintiff the sum of $5,000.00 to avoid further exposure on Defendants' counter claims. Plaintiff has demanded that Tri-State Insurance pay the sum of $5,000.00 as agreed, but it has failed and neglected to do so.
>
> 2. On or about the same date, Plaintiff and Defendants entered into an oral agreement to compromise and settle these cases. It was agreed that Defendants should pay to Plaintiff the total sum of $2,800.00 in full settlement of both pending cases.

We note that Tri-State was never a party to this action.

On September 15, 1987, the district court entered orders finding that "the parties reached a settlement whereby the defendants . . . would pay to the plaintiff the sum of $2,800.00, that the plaintiff would dismiss the petition with prejudice, and the defendants would dismiss their respective cross-petitions with prejudice and the plaintiff would deliver certain crop releases to the defendants." The court also found that defendants had partially performed the settlement and that the settlement should be approved and the parties ordered to

perform the same. The court also ordered that the petitions and cross-petitions be dismissed with prejudice pursuant to district court rule 16. That rule provides:

> It shall be the duty of attorneys to immediately notify the court of the dismissal, settlement, or other final disposition of any case. Upon notice to the court or to the clerk that an action has been settled, counsel shall file within 30 days thereafter, unless otherwise directed by written order, such pleadings as are necessary to terminate the action; upon failure to do so, the court may order dismissal of the action without further notice and without prejudice to the right to secure reinstatement of the case within 60 days after the date of said order by making a showing of good cause as to why settlement was not in fact consummated.

A settlement agreement is subject to the general principles of contract law. *Fleming Co. of Nebraska v. Michals*, 230 Neb. 753, 433 N.W.2d 505 (1988); *Omaha Nat. Bank v. Mullenax*, 211 Neb. 830, 320 N.W.2d 755 (1982). In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Fleming Co. of Nebraska v. Michals, supra.*

In support of its assignments of error, Heese appears to argue that the correspondence offered as evidence of the oral settlement agreement reached by Mills and Balsiger was inadmissible under Neb. Rev. Stat. § 7-107(2) (Reissue 1987), which provides:

> An attorney or counselor has power . . . (2) to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court . . . .

See, also, *Simmons v. Murray*, 189 Neb. 695, 204 N.W.2d 800 (1973) (Newton, J., dissenting), *overruled, Omaha Nat. Bank v. Mullenax, supra.*

We note that no objections were made by any of the parties to any of the evidence admitted during the September 2 hearing.

In *Anderson v. Walsh*, 109 Neb. 759, 763, 192 N.W. 328, 329 (1923), this court held that the former version of § 7-107(2) "[did] not make an oral contract invalid, but only relate[d] to the character of evidence by which it may be established." The *Anderson* court further stated at 763, 192 N.W. at 329-30:

> All the evidence on the question was received in the district court without objection, and the attorney for plaintiff also testified concerning it, though his testimony did not coincide with that produced for defendants. Had plaintiff made timely objection, the evidence might have been excluded, but, in failing to object, she waived her right to have the contract established by only such evidence as the statute makes competent.
>
> It is incumbent on one, not wishing to be bound by evidence made incompetent by statute, to make timely objection when it is offered. It is too late to raise the objection for the first time in the appellate court.

Since no objection was made to any of the evidence offered during the hearing, Heese's argument is without merit.

Heese further contends the oral settlement agreement was unenforceable under *Omaha Nat. Bank v. Mullenax, supra* at 836, 320 N.W.2d at 758, a quiet title action, where we held:

> An alleged oral compromise and settlement agreement not made in open court is unenforceable where it is in violation of the statute of frauds or in violation of a court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or their attorneys.

In connection with this argument, Heese contends the oral settlement agreement was in violation of the statute of frauds, Neb. Rev. Stat. § 36-202(2) (Reissue 1988), which provides: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: . . . (2) every special promise to answer for the debt, default, or misdoings of another person . . . ."

We have held that where the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the

promise is made on sufficient consideration, it will be valid although not in writing. *Branham v. McGinnis*, 203 Neb. 664, 280 N.W.2d 47 (1979); *VSC, Inc. v. Lilja*, 203 Neb. 844, 280 N.W.2d 901 (1979); *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N.W. 233 (1883). The consideration to support an oral promise to pay the debt of another must operate to the advantage of the promisor (Robert Lueders) and place him under a pecuniary obligation to the promisee (Heese) independent of the original debt (David Lueders' account), which obligation is to be discharged by the payment of that debt. *VSC, Inc. v. Lilja, supra.*

We determine that even if we characterize this situation as a promise by Robert Lueders to Heese that he would pay the debt of David Lueders, such promise was supported by new consideration and does not fall within the statute of frauds. The record shows that the $2,800 check was tendered by Robert Lueders pursuant to an agreement with Heese to settle both his and David Lueders' accounts for that amount. In return, Heese was to dismiss both petitions with prejudice and release the fertilizer liens filed against both defendants' crops. The record supports a finding that Robert Lueders acted primarily to promote his own interests in settling his own account with Heese and procuring the release of liens filed against his own crops. The settlement agreement, therefore, was not within the statute of frauds.

In the alternative, Heese contends the oral settlement agreement was unenforceable under our holding in *Omaha Nat. Bank v. Mullenax*, 211 Neb. 830, 320 N.W.2d 755 (1982), because the oral agreement violated rule 5 of the Uniform Rules for the District Court of the State of Nebraska, adopted on December 2, 1985, by the Sixth Judicial District. That rule provides:

> All stipulations not made in open court or in chambers and recorded by the reporter and all agreements of counsel or parties to a suit, must be reduced to writing and signed by the parties making the same and filed with the clerk, or they will not be recognized or considered by the court.

A copy of the uniform rules was admitted in evidence at the September 2 hearing.

While noncompliance with rule 5 may render an oral settlement agreement unenforceable, *Omaha Nat. Bank v. Mullenax, supra*, such should not be the result in this case. In the application prepared by Mills and filed in the district court on August 17, 1987, Heese specifically alleged that Tri-State agreed to pay Heese $5,000 "to avoid further exposure on Defendants' counter claims." Heese then specifically alleged that it and defendants "entered into an oral agreement to compromise and settle these cases. It was agreed that Defendants should pay to Plaintiff the total sum of $2,800.00 in full settlement of both pending cases."

The following exchange took place at the close of the September 2 hearing:

> MR. MILLS: . . . . [I]t is plaintiff's contention that the settlement that the plaintiff understood it would be receiving, a total of $7,800, and that settlement because of the refusal on the part of Mr. Balsiger's clients, Dave and Robert Lueders to execute the appropriate drafts and releases cannot be made. Therefore, there was no settlement and plaintiff would ask that the matter be scheduled for trial.
>
> THE COURT: Mr. Mills, as between parties, Heese Produce and David Lueders and Heese Produce and Robert Lueders — as between those parties your agreements and your correspondence with Mr. Balsiger indicates [sic] and your pleadings indicate that it was settled upon payment by the Lueders to your client of $2,800. Is that not correct?
>
> MR. MILLS: . . . That's correct, Your Honor, but the assumption that his clients would execute whatever releases we felt appropriate we would obviously reciprocate by releasing whatever releases they felt deemed appropriate.

Upon receipt of Balsiger's March 30, 1987, letter and enclosures, neither Mills nor Kruger informed the district court that a settlement had not been reached. Instead, Heese made application to the court for the $2,800 settlement amount.

The record shows that Heese conducted separate negotiations with the defendants on the original petitions and

with Tri-State on the cross-petitions. Heese admitted in its application filed in the district court and Mills admitted at the September 2 hearing that Heese had agreed to settle its claims against the defendants for a total of $2,800.

In *Omaha Nat. Bank v. Mullenax, supra*, we recognized that court rules are related to statutes of fraud but also are based upon additional principles of efficient judicial administration. District court rule 27 provides, "Any of the foregoing rules shall be subject to such modification by the court as may be necessary in special instances to meet emergencies or to avoid injustice or great hardship." In appropriate circumstances where no injustice would result, the district court may exercise its inherent power to waive its own rules. See, e.g., *Raymond v. Ingram*, 47 Wash. App. 781, 737 P.2d 314 (1987).

We determine that the rule 5 requirement that "all agreements of counsel or parties to a suit, must be reduced to writing and signed by the parties making the same" was waived by the trial court and that no injustice resulted from this waiver.

To have a settlement agreement, there must be a definite offer and an unconditional acceptance. *Fleming Co. of Nebraska v. Michals*, 230 Neb. 753, 433 N.W.2d 505 (1988). The evidence presented, without objection, at the September 2 hearing supports a finding that the parties reached a settlement agreement whereby defendants would pay to Heese a sum of $2,800, that Heese would dismiss its petitions with prejudice, that defendants would dismiss their cross-petitions with prejudice, and that Heese would deliver certain releases of crop liens to the defendants. Heese's alleged separate negotiations with Tri-State regarding settlement of defendants' claims against Heese do not fall within the scope of this agreement. The findings of the trial court to this effect are not clearly wrong.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF GEORGE FARM CO.
GEORGE FARM CO., APPELLANT, V. NORTHEAST NEBRASKA TELEPHONE COMPANY, APPELLEE.

443 N.W.2d 285

Filed July 28, 1989. No. 87-1054.

Public Service Commission: Appeal and Error. In an appeal from an order of the Public Service Commission, this court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.

Appeal from the Nebraska Public Service Commission. Reversed and remanded with directions.

Kurt T. Rager, of Rager & Hohenstein, P.C., for appellant.

Robert G. Scoville, of Ryan & Scoville, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The applicant, George Farm Co., a farm corporation, appeals from an order of the Nebraska Public Service Commission denying its request to have its property removed from the service area of the Northeast Nebraska Telephone Company's Jackson exchange and to be placed within the service area of Northwestern Bell Telephone Company's South Sioux City exchange.

In an appeal from an order of the Public Service Commission, this court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary. If there is evidence to sustain the findings and action of the commission, this court cannot intervene. *In re Application of Overland Exp.*, 229 Neb. 524, 428 N.W.2d 166 (1988).

The applicant farm corporation is located on a parcel of land in northeast Nebraska consisting of approximately 2,200 to 2,300 acres. The land is divided approximately in half by the boundary line between the two telephone companies servicing the area. The land west of the boundary line is within

Northeast's Jackson service area, while the land east of the boundary line is within Northwestern Bell's South Sioux City service area.

There are three residences on the applicant's property. Leland George, president of the corporation, lives in one house, and Bradley Altena, a farmer and mechanic employed by the applicant, lives in a house just to the west, both of which are within the area designated for service by Northeast's Jackson exchange, but within one-fourth mile from the boundary line of Northwestern Bell to the south and east. A trailer home on the property, which at the present time is unoccupied but apparently still has a telephone line available, is within the South Sioux City exchange of Northwestern Bell.

The applicant does virtually all of its business within the South Sioux City service area, and does practically no business in the communities served by the Jackson exchange. In general, all of the business and social contacts of the applicant; Leland George; his son David George, who is an officer of the corporation; and Altena are in the South Sioux City area. Leland George's mailing address, which apparently also acts as the applicant's address, is in South Sioux City. Repairs to the farm equipment are generally made within the South Sioux City or Sioux City, Iowa, area. The school that Altena's children attend is within the service area of Northwestern Bell. In short, the applicant's only contact with Jackson is some property located there. One or fewer calls to Jackson per month are made by the applicant's employees, while the calls to the South Sioux City area average 15 to 20 per day. However, because the applicant has a Jackson phone, some mail is directed to it at a Jackson address, rather than the proper South Sioux City mailing address. As a result, some mail is misdirected and not received.

The calls made to locations outside the Jackson exchange do not require the payment of a long-distance fee. This is because, although the western half of the property is within the Jackson service area, the applicant has had a foreign exchange telephone service line (an "FX" line) through the Jackson exchange since the spring of 1987. The FX line enables the applicant's employees to make phone calls to South Sioux City without a

long-distance charge. Because of this fact, the applicant (actually, Leland George) also has a South Sioux City telephone number and is listed in the South Sioux City telephone directory. The charge for the FX hookup, which apparently is a flat charge for the extended service, is approximately $130 per month. That charge is in addition to the regular monthly charge for the Jackson telephone service.

The applicant applied with the Public Service Commission to be removed from the Jackson exchange and placed within the South Sioux City exchange. Parties potentially affected by the application were listed as Northeast and Northwestern Bell. After both of these parties failed to file a protest to the application, the applicant filed a motion before the Public Service Commission asking it to grant the relief requested in the application based on 291 Neb. Admin. Code, ch. 1, § 014.01 (1985). This section states that "failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding."

The application came before the commission for hearing August 27, 1987. The applicant renewed its motion, which the commission noted and took under advisement. The commission then proceeded with the hearing, during which both the applicant and Northeast presented evidence. Upon the applicant's motion pursuant to § 014.01, the commission held that despite the telephone companies' failure to protest, under Neb. Rev. Stat. §§ 75-612 and 75-613 (Reissue 1986), the applicant was nevertheless required to present evidence at a hearing to establish its case, and its motion was overruled. Following the hearing, the commission, relying on § 75-613, which states that before granting an application the commission must find that the applicant is not receiving reasonably adequate service, denied the application based on a statement by Leland George that the existing telephone service is "okay."

The applicant filed a motion for rehearing, which was resisted by Northeast. The motion was overruled.

The applicant has appealed, assigning as error that (1) since no timely protest was filed by any of the parties to the action, the commission erred in overruling the applicant's motion to grant the relief requested in its application; (2) Northeast

waived its right to participate in the proceedings by failing to timely file a protest to the application with the commission; and (3) the commission erred in finding that the applicant did not meet its burden of proof with respect to the allegations of its application.

We find it unnecessary to discuss appellant's first two assignments of error. Upon a consideration of the entire record, we find that the commission's order was arbitrary and unreasonable and must be reversed.

Sections 75-612 and 75-613 provide in part as follows:

> Any one . . . may file an application with the Public Service Commission to obtain the telephone service furnished in the exchange service area adjacent to the territory in which the applicant or applicants reside or operate.

§ 75-612.

> Upon the completion of the hearing on such an application . . . the Public Service Commission may grant the application, in whole or in part, if the evidence establishes all of the following:
>
> (1) That such applicant or applicants are not receiving . . . adequate exchange telephone service . . . . The fact that an applicant is required to pay toll charges for long distance telephone calls to an exchange service area adjacent to the territory in which the applicant resides or operates shall not be deemed to constitute inadequate exchange telephone service from the company furnishing such service;
>
> (2) The revision of the exchange service area or areas required to grant the application will not create a duplication of facilities, is economically sound and will not impair the capability of the telephone company or companies affected to serve the remaining subscribers in any affected exchanges;
>
> (3) The community of interest in the general territory is such that the public offering of each telephone company in its own exchange service area involved should include all the territory in its service area as revised by the commission's order; and

(4) The applicant or applicants are willing and will be required to pay such construction and other costs and rates as are fair and equitable and will reimburse the affected company for any necessary loss of investment in existing property as determined by the Public Service Commission.

§ 75-613.

From a consideration of the entire record, we find that it makes no sense for half of the applicant's property to be within one exchange and the other half to be within another exchange. Furthermore, forcing the applicant to bear the burden of paying for two phone services for the same property so that such property and its occupants may have full service to the general area comprising their community of interest is arbitrary and unreasonable.

It is true that "[t]he fact that an applicant is required to pay toll charges for long distance telephone calls to an exchange service area adjacent to the territory in which the applicant resides or operates shall not be deemed to constitute inadequate exchange telephone service from the company furnishing such service." § 75-613(1). However, we construe the additional $130 per month that the applicant must pay for the FX line to be a service fee, not a toll charge. We interpret a toll charge as contemplated in the statute as a charge for a single long-distance call, not a monthly flat fee for service. See, 18 The Oxford English Dictionary 202 (2d ed. 1989) (defining a toll as "[a] charge for a telephone call"); Webster's Third New International Dictionary, Unabridged 2405 (1981) ("a charge for a long-distance telephone call").

Therefore, the fact that the applicant is required to pay a monthly fee so that all of its property can be within the same telephone exchange strikes us as a justifiable reason for granting the relief requested. Had the residences in which Leland George and Altena live been built just one-fourth mile to the east, all of the residences on the property would have been within the same telephone exchange and within the exchange in which virtually all of the applicant's business is conducted.

We hold that the decision of the commission denying the

applicant's request to have all of its property placed within the service area of Northwestern Bell's South Sioux City exchange was unreasonable and arbitrary and should be reversed. The cause is remanded to the commission with directions to grant the application.

REVERSED AND REMANDED WITH DIRECTIONS.

BACK ACRES PURE TRUST ET AL., APPELLANTS, V. RAY J. FAHNLANDER ET AL., APPELLEES.

443 N.W.2d 604

Filed July 28, 1989. No. 88-074.

1. **Attorney and Client.** As a general rule, no person shall represent another through the practice of law unless he or she has been previously admitted to the bar by order of the Supreme Court.
2. **Trusts: Actions.** Generally, a trust is not a legal personality, and the trustee is the proper person to sue or be sued on behalf of such trust.
3. **Trusts: Attorney and Client.** A trustee's duties in connection with his or her office do not include the right to present argument pro se in courts of this state, because in this capacity such trustee would be representing interests of others and would therefore be engaged in the unauthorized practice of law.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Appeal dismissed.

E.L. Peister for appellants.

Michael V. Smith, of Smith and King, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is a purported appeal by Back Acres Pure Trust and its trustees Larry Newman and Virginia K. Campbell from a judgment of the district court, which sustained the defendant Jack D. Carnahan's motion for summary judgment. The plaintiffs had sought to quiet title in themselves to portions of Section 19, Township 33 North, Range 47 West, and Section 24,

Township 33 North, Range 48 West, in Dawes County, Nebraska. E.L. Peister, a nonlawyer, who was not one of the original plaintiffs, was permitted to appear in this court pro se, as his interests might appear. It is now apparent that he should not have been permitted to argue.

The record discloses that although Peister stated to the trial court that he had been named a trustee and would furnish the court with a copy of the minutes showing his appointment and that he was now serving as such trustee together with Newman and Campbell, no such showing was ever made. He signed the brief of appellants on behalf of himself and appellants. In actuality, he had no authority to appear pro se as a trustee, and certainly not as a representative of appellants.

> Except as provided in section 7-101.01, no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state.

Neb. Rev. Stat. § 7-101 (Reissue 1987).

It is true that, as a general rule, a trust is not a legal personality, and the trustee is the proper person to sue or be sued on behalf of such trust. *Larson v. Sylvester*, 282 Mass. 352, 185 N.E. 44 (1933); *Williams v. Downing*, 185 Okla. 633, 95 P.2d 612 (1939). However, we agree with the holding of the Supreme Court of Hawaii that a trustee's duties in connection with his or her office do not include the right to present argument pro se in courts of the state, because in this capacity such trustee would be representing interests of others and would therefore be engaged in the unauthorized practice of law. See *In re Ellis*, 53 Haw. 23, 487 P.2d 286 (1971).

Because Peister had no authority to file a brief in this matter, either in his own behalf or on behalf of appellants, appellants' briefs are ordered stricken, and the appeal is dismissed.

APPEAL DISMISSED.

THE COLLECTION BUREAU OF LINCOLN, NEBRASKA, INC., ASSIGNEE, APPELLEE, V. KENNETH LOOS, APPELLANT.
443 N.W.2d 605

Filed July 28, 1989. No. 89-367.

Motions for New Trial: Courts. A motion for new trial is not properly presented to the district court after its decision affirming or reversing the judgment of the county court. In such an instance, the district court sits as an intermediate appellate court, not a trial court. A motion for new trial is proper only in the trial court.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Appeal dismissed.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Kenneth Loos appeals an order of the Lancaster County District Court, which, acting in its appellate capacity, affirmed the Lancaster County Court in awarding judgment against Loos and in striking appellant's cross-petition.

In this court, The Collection Bureau of Lincoln, Nebraska, Inc. (CB), assignee and original plaintiff in the trial court, filed a motion for summary disposition under Neb. Ct. R. of Prac. 7B(1) (rev. 1989), claiming this court lacked jurisdiction. We do lack jurisdiction and dismiss Loos' appeal.

After the Lancaster County Court entered judgment against Loos and struck his cross-petition, Loos timely appealed to the Lancaster County District Court. On February 1, 1989, the district court affirmed the judgment of the county court. On February 8, Loos filed a motion for a new trial in the district court. After a hearing, the motion was overruled on March 21, 1989.

On April 18, 1989, 76 days after the district court affirmed the judgment of the county court, Loos filed a notice of appeal to this court. CB asserts that the notice of appeal was not filed in time to give this court jurisdiction. We agree.

The issue presented is whether a motion for a new trial in the district court is a proper pleading where the district court,

acting as an intermediate appellate court, affirms a county court judgment. *State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984), is determinative of the issue. There, we found that Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982) provided that,

> with certain exceptions not material here, the district court reviews appeals from the county court for error appearing on the record made in the county court. Consequently, a motion for new trial based on newly discovered evidence is to be presented to the county court as the fact finder, not to the district court which sat as an appellate court.

State v. Ferris, supra at 607, 344 N.W.2d at 669.

Loos argues (1) that *Ferris* is not applicable because it is a criminal case and (2) that the district court hearing in his case was a trial. Except in certain circumstances not relevant here, § 24-541.06 (Cum. Supp. 1988) applies equally to civil and criminal appeals.

Loos' argument that the hearing in district court was a trial has no support in fact or in law. The county court bill of exceptions was before the court pursuant to § 24-541.06(2). There was no other evidence and, in fact, no trial. Section 24-541.06(1) provides that the district court shall review the case for error appearing on the record made in county court.

A motion for new trial is not properly presented to the district court after its decision affirming or reversing the judgment of the county court. In such an instance, the district court sits as an intermediate appellate court, not a trial court. A motion for new trial is proper only in the trial court.

CB's motion for summary disposition is sustained and the appeal dismissed for this court's lack of jurisdiction, the notice of appeal having been filed out of time.

APPEAL DISMISSED.

GERALD L. GEHRE AND LEONARD D. GEHRE, COPERSONAL REPRESENTATIVES OF THE ESTATE OF LOIS IRENE GEHRE, DECEASED, APPELLANTS, V. GEORGE RICHARD COLEMAN AND CHARLES MESSBARGER, APPELLEES.

443 N.W.2d 606

Filed August 4, 1989. No. 87-066.

Pleadings: Negligence: Jury Instructions: Appeal and Error. Where contributory negligence is pleaded as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for a new trial.

O. William VonSeggern, of Grimminger & VonSeggern, for appellants.

Jeffrey H. Jacobsen and Daniel L. Lindstrom, of Jacobsen, Orr, Nelson & Wright, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

The copersonal representatives of the estate of Lois Irene Gehre brought a medical malpractice action against George Richard Coleman and Charles Messbarger, both certified registered nurse anesthetists (CRNA), claiming the defendants' negligence caused the death of decedent. After trial the jury returned a verdict in favor of defendants. Plaintiffs timely appealed, alleging a single error: that the trial court erred in submitting the issue of the decedent's contributory negligence to the jury. We reverse.

The record shows that the decedent was the mother of the copersonal representatives. She was born in 1908 and was 73 years old at the time of her death on July 1, 1982. The decedent was described as a registered nurse who last worked as an "industrial nurse" at Rockwell, a plant near Kearney, where she administered first aid. Her last year of work at the plant is not definitely known, but one of her friends testified that when the two became friends, 20 or 25 years before decedent's death,

decedent was primarily doing volunteer nursing work.

On the afternoon of June 8, 1982, the decedent entered Good Samaritan Hospital in Kearney, Nebraska, to undergo a hemorrhoidectomy. That evening Gerald Messbarger, CRNA and brother of defendant-appellee Charles Messbarger, visited decedent in her hospital room. While in the room, Gerald Messbarger had decedent complete a "Pre-anesthesia Patient Questionnaire." She completed the questionnaire as follows:

> PRE-ANESTHESIA PATIENT QUESTIONNAIRE
>
> The following questions have been designed for use by the Department of Anesthesia. They are to be completed before the operation. Please answer each question carefully and return the completed sheet to the nurse as soon as possible.
>
> ANSWER yes (Y) no (N) don't know (D)
>
> 1. Are you taking any prescription medicine for your: heart __n__ ? blood pressure __n__ ? breathing __n__ ? nerves __n__ ? other __none__ ? Give names of medicines:___
>
> ---
>
> 2. Have you taken any cortisone or ACTH in the past six months other than into, joints or pain areas by injection __n__ ? Explain _____
>
> ---
>
> 3. Do you have: chronic cough __y__ ? irregular heart beat __n__ ? shortness of breath __n__ ? chest pain __n__ ? dizziness __n__ ? other _____ ? Explain _____
>
> ---
>
> 4. To the best of your knowledge, are you allergic to any medicines __y__ ? If yes, what?
> Codiene [sic]
>
> 5. Do you object to blood transfusions if they are deemed necessary during surgery __n__ ?
>
> 6. When was your last anesthetic or surgery? Date __none__
>
> 7. Other major surgical procedures done in the past 5 years and date. __none__
>
> 8. Have you ever had a reaction or other complication to an anesthetic of any kind: __n__ ? Explain _____
>
> ---

9. Has any member of your family had a complication to a general anesthetic _____? Explain _____

_____

10. Have you ever had "yellow jaundice" liver disease _____? pneumonia or TB __n__? diabetes __n__? other serious illnesses __n__? Explain _____

_____

11. Have you recently been exposed to large amounts of herbicides or insecticides _____?

12. Do you have your own teeth __y__? false __n__? partials __n__? loose teeth __n__? caps __n__? permanent bridge _____?

13. Do you smoke __n__? How much _____?

14. Do you wear contact lenses __n__?

15. How tall are you __5-3__? how much do you weigh __110__? any major recent loss __n__?

16. FOR OUTPATIENTS: When did you last drink or eat anything? _____

17. FOR FEMALES: Do you suspect that you may be pregnant _____?

_____ /s/ Lois Gehre _____

Date Signature of Patient

After decedent had completed the questionnaire, Gerald Messbarger explained the reason for the questionnaire and then went through each question sequentially with her. Gerald Messbarger also explained to decedent that she would be receiving a caudal anesthetic.

The following morning, June 9, 1982, decedent was given 50 milligrams of Demerol as a preoperative sedative, and an intravenous solution of dextrose and electrolytes. Defendant-appellee George Richard Coleman, CRNA, had decedent roll into a prone position with two pillows beneath her pelvis to elevate her buttocks. Coleman reviewed her electrocardiogram and noted that she had a left bundle branch block in her heart. Charles Messbarger, who had known decedent since 1962, talked to her at this time. Although Coleman was the assigned anesthetist for decedent's operation, Charles Messbarger had a few minutes, so he assisted Coleman.

Hospital records show the following, with great specificity as to times. Decedent was monitored by an electrocardiogram and an automatic blood pressure monitor. Decedent was given a 5-cubic-centimeter test dose of Marcaine. During this time, Charles Messbarger was at decedent's head, monitoring her vital signs. Coleman waited 3 minutes in order to determine whether the anesthesia would cause an adverse reaction. Then another 10 cubic centimeters of Marcaine was injected into decedent's lower back. Charles Messbarger reported that decedent's blood pressure was 130 over 82 at both 10:15 and 10:20 a.m., and upon her request for a sedative, Messbarger gave decedent 4 milligrams of Valium at 10:21 a.m.

At 10:25 a.m., Coleman removed his gloves and began to clean up. At this time, decedent's blood pressure had fallen to 110 over 60, and the surgeon began the hemorrhoidectomy. Charles Messbarger last spoke to decedent at 10:27 a.m. and left the operating room at 10:28 a.m. Decedent stopped breathing between 10:28 a.m. and 10:30 a.m. At 10:30 a.m., decedent's blood pressure had fallen to 95 over 45, her heart rate was approximately 56 beats per minute, and Coleman noticed that decedent was pale and cyanotic. Coleman called to decedent, but she did not respond. Coleman informed the surgeon. Oxygen was administered. The blood pressure monitor showed that decedent had no blood pressure, and the surgeon began a heart massage.

Decedent was given 10 cubic centimeters of epinephrine and .4 milligrams of atropine to restore her heartbeat, sodium bicarbonate to restore her blood pH level, and calcium chloride to increase the effectiveness of her heart. At both 10:36 a.m. and 10:41 a.m., she was given electric shock to restore her heartbeat, and at 10:40 a.m. she was given 3 milligrams of Levophed to increase her blood pressure.

At about 11 a.m., decedent was taken to intensive care. She never regained consciousness. A tracheostomy was performed, and decedent's thyroid was found to be abnormal. On June 21, 1982, decedent's tube feeding, antibiotics, and telemetry were discontinued. She died on July 1, 1982.

The plaintiffs alleged in their amended petition that defendants were negligent in not adequately obtaining and

evaluating decedent's medical history prior to the operation, in not properly monitoring her condition during the operation, and in not promptly notifying the attending physician of decedent's condition during surgery.

The defendants answered and alleged that decedent, as a registered nurse for many years, possessed sufficient knowledge to give an accurate history of her prior illnesses, conditions, or afflictions and her past use or nonuse of prescribed medications. The defendants further alleged decedent knew she was suffering from a thyroid condition when she entered the hospital for the operation and knew that medication for the condition had been prescribed in the past which she had not continued to take. Defendants also alleged that decedent should have been aware that this condition could place her at risk from the administration of anesthesia and that she failed to disclose the condition to the defendants. Defendants alleged that this conduct amounted to contributory negligence of a degree more than slight in comparison with any negligence on the part of the defendants, and barred recovery by plaintiffs in their wrongful death action.

The case was tried before a jury on November 19 and 21, 1986. During the trial, Reed Peters, M.D., an anesthesiologist, testified by videotape deposition. Peters testified that the defendant anesthetists were negligent and that their negligence was the proximate cause of decedent's death. Peters testified that decedent would have survived but for the following: (1) The defendants should have administered oxygen throughout the procedure; (2) the caudal anesthesia should have been administered in increments; and (3) the defendants failed to properly monitor decedent's vital signs during the operation. Peters also testified that hypothyroid patients do not tolerate anesthetics well.

Robert Sidner, M.D., a specialist in internal medicine, testified on behalf of the defendants. Sidner's opinion was that several factors contributed to decedent's death from hypoventilation. These factors included respiratory depression from medications, decedent's age, narcotic medication given prior to the operation, and the particular medication decedent received. In addition, decedent had a chronic pulmonary

condition, a diaphragmatic hernia, and trouble swallowing. Sidner also testified the decedent had a somewhat unusual anatomy, making it very easy for her to have an upper airway obstruction. Finally, Sidner testified, "[A]ll of these things plus we have her thyroid condition, I think is significant in this case because this would slow down the metabolism of the demerol."

Instruction No. 2, submitted to the jury, provided in part:

> Defendants deny that they were negligent whatsoever with regard to the care of Lois Irene Gehre. Defendants further allege that Lois Irene Gehre was contributorily negligent in that she failed to disclose her thyroid condition to the defendants at the time her pre-anesthesia history was taken. Defendants therefore pray that the plaintiffs' petition be dismissed.

The jury also received instruction No. 12, which provided in part:

> In connection with the defendants' claim that the decedent was herself negligent, the burden is on the defendants to prove by the greater weight of the evidence all of the following:
>
> 1. That Lois Irene Gehre had a thyroid condition at the time of the surgery;
>
> 2. That Lois Irene Gehre knew or should have known that she had a thyroid condition and that her thyroid condition could place her at risk for the administration of anesthesia;
>
> 3. That Lois Irene Gehre failed to disclose or advise the defendants concerning her thyroid condition;
>
> 4. That the failure of Lois Irene Gehre to disclose her thyroid condition to the defendants was a proximate cause . . . of the death of Lois Irene Gehre.

Both of these instructions were objected to by plaintiffs. In *Spath v. Coon*, 189 Neb. 822, 823, 205 N.W.2d 541, 542 (1973), we held: "Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence." We must determine whether there was any competent evidence to support the second of the four factors set out in instruction No. 12.

While the defendants' expert did testify that decedent had a thyroid condition in 1977, he also testified during his cross-examination that there was no evidence that she had been instructed to take any medication for the condition at any time after 1977. Additionally, there was no evidence offered to show that decedent's 1977 thyroid condition was chronic.

There was no evidence that decedent, as a registered nurse educated in the 1920s or 1930s and retired from active nursing for more than 20 years, knew or should have known that a thyroid condition would make the administration of a particular anesthesia dangerous. Nor was there any evidence that any of the drugs administered to decedent were in common use during the time she was a practicing nurse.

The defendants contend that decedent was contributorily negligent in that she failed to disclose her thyroid condition in her answers to the preoperation questionnaire. There was no evidence that decedent knew or should have known that she had a thyroid condition at the time her medical history was taken or that such condition was death-threatening in connection with her proposed surgery. Decedent was never asked whether she had a thyroid condition by Gerald Messbarger, and the preanesthesia questionnaire did not request such information, nor was there any evidence that decedent knew or should have known that a thyroid condition was a "serious illness."

Defendants contend that "the standard of care ascribed to a patient is that of a reasonably prudent person" and that "[i]n this case, because of Lois Irene Gehre's long history of professional experience as a registered nurse, her conduct must be considered in light of her specialized knowledge and expertise." Brief for appellees at 18. To support their contention that decedent had more knowledge than a nonnurse patient, defendants relied on the testimony of Gerald Messbarger that before he graduated as a certified nurse anesthetist in 1955, he received certain training which resulted in knowledge he had "concerning the function of the thyroid gland and its importance." There was no evidence as to the training in such areas received by a nurse who graduated from a college in Oberlin, Kansas, in the late 1920s or early 1930s and whose nurse's work during that 20 or 25 years before her death had

been on a volunteer basis. The evidence in this case is wholly lacking to impose a greater burden on the patient in this case than on the professionals seeking medical information from her. There is no evidence in this record on which sufficient knowledge can be attributed to decedent which would result in her being contributorily negligent. There is no evidence that decedent's answers to the questionnaire submitted to her were not truthful.

There was no evidence submitted to support a finding of contributory negligence; it was prejudicial error for the trial court to have submitted the issue to the jury. The judgment of the district court is reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

SANITARY AND IMPROVEMENT DISTRICT NO. 272 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. BERNARD MARQUARDT, AN INDIVIDUAL, ET AL., APPELLEES.

443 N.W.2d 877

Filed August 4, 1989. No. 87-761.

1. **Demurrer: Declaratory Judgments.** The use and determination of a demurrer in actions arising under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), are controlled by the same principles as apply in other cases.
2. **Demurrer: Pleadings.** When considering a general demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
3. _____: _____. In ruling on a general demurrer, a court is required to accept the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept the conclusions of the pleader; nor may a court assume the existence of any facts not alleged, find facts in aid of the pleading, or consider evidence which may be introduced at trial.
4. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one the right to judicial relief.
5. **Sanitary and Improvement Districts: Warrants: Words and Phrases: Uniform Commercial Code.** Sanitary and improvement district warrants are investment

securities under article 8 of the Uniform Commercial Code.

6. **Sanitary and Improvement Districts: Municipal Corporations: Uniform Commercial Code: Words and Phrases.** A sanitary and improvement district is a municipal corporation and a political subdivision of the state and, as such, is a "government or governmental agency or unit" for the purposes of Neb. U.C.C. § 8-202 (Reissue 1980).
7. **Uniform Commercial Code: Warrants: Consideration: Notice.** None of the events which validate an otherwise defective governmental investment security under the provisions of Neb. U.C.C. § 8-202 (Reissue 1980) apply unless the warrants in question are in the hands of purchasers for value and without notice of the claimed defect.
8. **Pleadings: Actions: Parties: Joinder.** Causes of action involving different defendants cannot be joined unless each cause affects all the defendants and they have a joint or common liability or interest.
9. **Pleadings: Actions.** In determining whether more than one cause of action is stated, the main test is whether more than one primary right or subject of controversy is presented; other tests are whether recovery on one ground would bar recovery on the other, whether the same evidence would support different counts, and whether separate actions could be maintained for separate relief.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Steven J. Riekes, of Richards, Riekes, Brown & Zabin, P.C., for appellant.

Eugene L. Pieper, David J. Koukol, and Robert L. Homan, of Thompson, Crounse, Pieper, Wallace and Eggers, P.C., and Dennis E. Martin, of Martin & Martin, for appellees Eggert et al.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Plaintiff-appellant, Sanitary and Improvement District No. 272 of Douglas County, challenges the trial court's dismissal of its operative petition for declaratory judgment following the sustainment of demurrers filed by certain of the defendants-appellees. We affirm in part, and in part reverse and remand for further proceedings.

The aforesaid petition names 2 corporate and 31 individual defendants, including "John Doe and Richard Roe, real and

true names unknown," alleging, in sum, that the corporate defendants, M & A Enterprises, Inc., and M & A Irrigation Supplies, Inc., and the three principals of these entities, defendants Bernard Marquardt, George Allison, Jr., and John Hoich, conspired together with defendant David Weyh, an irrigation contractor, and with the former chairman of the district's board of trustees, defendant Francis Sullivan, to defraud the district by devising a scheme to construct an in-ground green space irrigation system in circumvention of the statutory requirements for approval by various duly constituted public bodies of the city of Omaha and county of Douglas. The petition further asserts that the former attorney for the district, defendant Warren Zweiback, breached his fiduciary duty to the district by assisting the scheme; that former district trustees, defendants Rick Cushing, Patrick Kelley, Louise Scolaro, and David Ecklund, breached their fiduciary duties to the district by approving the contracts drawn pursuant to the scheme; that the remaining 21 individual named defendants hold warrants drawn on the district's accounts pursuant to the fraudulent scheme; and that these warrants are void because they were issued as a result of the scheme. The petition names as a defendant "Sam J. Howell, Treasurer of Douglas County," averring that he, as ex officio treasurer of the district, is the individual charged with the duty to pay the district's warrants as they come due.

For the sake of convenience, where appropriate, the various defendants will be referred to hereinafter as follows: defendants Marquardt, Allison, Hoich, M & A Enterprises, M & A Irrigation Supplies, and Weyh as the "contractor defendants"; defendants Sullivan, Cushing, Ecklund, Kelley, Scolaro, and Zweiback as the "board defendants"; and defendants Orville Eggert, Elinor Eggert, Donald W. Pederson, Philip W. Smith, Carol Ann Mellott, Barbara Jo Benson, Suzanne Kay Yost, Don W. Elliott, Jayne E. Eades, Arley A. Westendorf, Darrel Adamson, Marjorie A. Ward, Jacqulyn R. Bandiera, Phyllis L. Phalen, Gale V. Mares, Victor Mares, Walter J. Westendorf, William F. Ginn, Sara F. Ginn, and John Doe and Richard Roe, real and true names unknown, as the "holder defendants."

The petition prays, in essence, that the subject contracts and warrants issued pursuant to them be declared void; that certain of the contractor defendants and all of the holder defendants be enjoined from taking action for the payment of any warrant they own or hold; that defendant Howell be enjoined from paying the subject warrants; that certain of the contractor defendants and all of the board defendants be required to hold the district harmless from any liability it may be found to have with respect to any warrant "declared to be lawful in the hands of an innocent holder"; and that defendant Sullivan restore to the district the value of any favors or gratuities he received in connection with the scheme.

The holder defendants, except for Eades, Bandiera, the Ginns, and, of course, Doe and Roe, filed the demurrers referred to in the first paragraph of this opinion, which demurrers assert that the district's operative petition fails to state a cause of action against them and contains a misjoinder of parties and causes.

The district seems to argue for special relaxation of the rules of pleading in cases seeking relief under the provisions of the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985 & Cum. Supp. 1986). It has, however, long been the rule in this state that " '[t]he use and determination of the demurrer in actions arising under Declaratory Judgment Act is controlled by the same principles as apply in other cases.' " *Gottula v. Standard Reliance Ins. Co.*, 165 Neb. 1, 4, 84 N.W.2d 179, 182 (1957).

The rules with which we are first concerned are that when considering a general demurrer, that is, one which challenges the sufficiency of the allegations to state a cause of action, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989). More specifically, in ruling on a general demurrer, a court is required to accept the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept the conclusions of the pleader. Nor may a court assume the existence of any facts not alleged, find facts in aid of the pleading, or consider evidence which

may be introduced at trial. *Moore v. Grammer,* 232 Neb. 795, 442 N.W.2d 861 (1989); *Security Inv. Co. v. State,* 231 Neb. 536, 437 N.W.2d 439 (1989).

This court has recently observed that a cause of action consists of the fact or facts which give one the right to judicial relief. *Schoneweis v. Dando, supra.* The district maintains that the various holder defendants have in hand warrants it issued between June 13, 1984, and December 11, 1985, pursuant to fraudulent contracts, for which reason the warrants are void, and that these warrants, which represent capital expenditures, put the district's "public funds and property . . . in jeopardy." In this connection, we note that Neb. Rev. Stat. § 31-727(5) (Reissue 1988) provides in relevant part:

> (c) Capital outlay shall mean expenditures for construction or reconstruction of major permanent facilities having an expected long life, including, but not limited to, street paving and curbs, storm and sanitary sewers, and other utilities;
>
> (d) Warrant shall mean an investment security under Article 8 of the Uniform Commercial Code in the form of a short-term interest-bearing order payable on a specified date issued by the board of trustees or administrator of a sanitary and improvement district to be paid from funds expected to be received in the future, including, but not limited to, property tax collections, special assessment collections, and proceeds of sale of general obligation bonds.

The first import of the holder defendants' demurrers is that even if the facts are as the district alleges, its obligation to them on the warrants in their hands is unaffected; in short, that the district has no defense to its obligation to pay on the warrants in the holder defendants' hands. Our first task, then, is to examine the character of the subject warrants.

Sanitary and improvement district warrants are investment securities under article 8 of the Uniform Commercial Code. See, *Hollstein v. First Nat. Bank of Aurora,* 231 Neb. 711, 437 N.W.2d 512 (1989); *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983); § 31-727(5)(d).

The district is a municipal corporation, *In re Application of*

S.I.D. No. 65, 219 Neb. 647, 365 N.W.2d 456 (1985), and a political subdivision of the state, *Hollstein v. First Nat. Bank of Aurora, supra*, and, as such, is a "government or governmental agency or unit" which has identified itself as the "issuer" of the warrants in question. Neb. U.C.C. § 8-202 (Reissue 1980) provides in relevant part as follows:

> (2) (a) A security other than one issued by a government or governmental agency or unit even though issued with a defect going to its validity is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of constitutional provisions in which case the security is valid in the hands of a subsequent purchaser for value and without notice of the defect.
>
> (b) The rule of subparagraph (a) applies to an issuer which is a government or governmental agency or unit only if *either* there has been substantial compliance with the legal requirements governing the issue *or* the issuer has received a substantial consideration for the issue as a whole *or* for the particular security *and* a stated purpose of the issue is one for which the issuer has power to borrow money or issue security.
>
> . . . .
>
> (4) All other defenses of the issuer including nondelivery and conditional delivery of the security are ineffective against a purchaser for value who has taken without notice of the particular defense.

(Emphasis supplied.)

The foregoing statutory language makes clear that none of the events which validate an otherwise defective governmental investment security apply unless the warrants in question are in the hands of purchasers for value and without notice of the claimed defect. While the operative petition asserts that

> by reason of the fact that minutes of the District were improperly kept and were misleading, the citizens and taxpayers of said District, and the public in general, did not know, and could not have known, the true state of affairs regarding the transactions above-mentioned until after exposure thereof by the Omaha World Herald on

April 27, 1986,

it alleges nothing from which it can be inferred that each holder defendant gave value for the warrant or warrants he or she possesses. That being so, the district's petition presents a colorable defense to its obligation on the warrants in the hands of the holder defendants and therefore states a cause of action against them.

We thus turn our attention to the special demurrers, which assert the district has misjoined parties and causes of action. Neb. Rev. Stat. § 25-701 (Reissue 1985) provides that a plaintiff may "unite several causes of action in the same petition" if, so far as is relevant to this present case, the causes involve the "same transaction or transactions connected with the same subject of action" or concern "contracts, express or implied." However, Neb. Rev. Stat. § 25-702 (Reissue 1985) limits the foregoing by providing that, but for an exception not material to the inquiry now before us, "the causes of action so united must affect all parties to the action." Therefore, causes of action involving different defendants cannot be joined unless each cause affects all the defendants and they have a joint or common liability or interest. *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 391 N.W.2d 557 (1986). In determining whether more than one cause of action is stated, the main test is whether more than one primary right or subject of controversy is presented, other tests being whether recovery on one ground would bar recovery on the other, whether the same evidence would support different counts, and whether separate actions could be maintained for separate relief. *Brchan v. The Crete Mills*, 155 Neb. 505, 52 N.W.2d 333 (1952); *Sickler v. City of Broken Bow*, 143 Neb. 542, 10 N.W.2d 462 (1943).

There is nothing in the operative petition from which it can be inferred that all the holder defendants participated in the alleged acts of the board or of the contracting defendants, and thus nothing which creates in the holder defendants a joint or common liability with those other defendants. In addition, the petition before us presents numerous subjects of controversy, including the claimed fraud in entering into the contracts at issue, the alleged breach of various fiduciary duties, and whether each holder defendant is a purchaser for value without

notice. Nor does the district seek the same relief from all the defendants; it asks indemnity from some but not others and endeavors to enjoin some but not all. Thus, the conclusion that the petition before us misjoins both parties and causes of action is inescapable.

For the foregoing reasons, we affirm the ruling of the district court on the special demurrers and reverse its ruling on the general demurrers. Accordingly, the matter is remanded to the district court for further proceedings under the provisions of Neb. Rev. Stat. § 25-809 (Reissue 1985).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., dissenting in part.

I agree that the operative petition of Sanitary and Improvement District No. 272 of Douglas County misjoins parties and causes of action. I further agree with the majority's conclusion that Neb. U.C.C. § 8-202 (Reissue 1980) validates defective governmental investment securities only in the hands of purchasers for value and without notice. I part company with the majority only as to the burden of pleading, and ultimately the burden of proof, imposed by § 8-202 in a suit for declaratory judgment.

The majority reasons that as the petition "alleges nothing from which it can be inferred that each holder defendant gave value for the warrant or warrants he or she possesses," the district has alleged "a colorable defense to its obligation on the warrants" and has thus stated a cause of action. This approach overlooks the unique posture of this case, in which the district seeks a declaration that it is excused from paying the warrants in the hands of the holder, or demurring, defendants. It seems to me that because the district seeks such a declaration, it must affirmatively allege either that such defendants did not pay value for the warrants in their hands or that they had notice of the claimed defect in the issuance of the warrants.

By analogy, if an insurer seeks a judgment declaring that it has no duty to defend or indemnify an insured, the insurer has the burden of establishing that the event falls within the policy's exceptions to or exclusions from coverage. This is so because, in filing a petition for declaratory judgment relieving it of liability

on the policy, the insurer is relying on what would otherwise be an affirmative defense. See, *Concord Insurance Co. v. Miles*, 118 N.J. Super. 551, 289 A.2d 267 (1972); *Republic Casualty Company v. Obregon*, 290 S.W.2d 267 (Tex. Civ. App. 1956) (writ of error refused).

In so saying, I am not unmindful that Neb. U.C.C. § 8-105 (Reissue 1980) provides, in any action on a security after it is shown that a defense or defect exists, "the plaintiff has the burden of establishing that he or some person under whom he claims is a person against whom the defense or defect is ineffective." I recognize, too, that the comments following this section of the code state that the above language makes the rule stated in Neb. U.C.C. § 3-307 (Reissue 1980), dealing with negotiable instruments, applicable to securities. Section 3-307(3) provides: "After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course." However, the foregoing statutory language and comments contemplate the usual litigation posture in which the holder plaintiff seeks to recover on a security in his or her hands, and the issuer defendant seeks to avoid liability by raising a defense or defect. In such an instance, it becomes the plaintiff's burden to show that he or she is a purchaser for value and without notice. Here, however, the posture is the reverse of the usual situation: the issuer district has sued for a judgment declaring it is not liable. Logic therefore dictates that the burdens of pleading and proof be reversed as well.

By asserting that none but the perpetrators of the fraud could have known of its existence, the district has alleged, in effect, that the demurring defendants had no notice of the fraud. That leaves the question of what in the petition asserts that the demurring defendants did not pay value for the warrants they possess. The answer is—nothing. Nor does the majority pretend otherwise. Indeed, the petition itself acknowledges that at least some of the demurring defendants may be purchasers for value, as it prays that certain other defendants indemnify the district from any liability it may be found to have to "an innocent holder."

Accordingly, the operative petition fails to state a cause of action, and the court below correctly dismissed it. The judgment below should therefore be affirmed in its entirety.

SHANAHAN, J., joins in this dissent.

SCHOOL DISTRICT OF WATERLOO, DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. DREW HUTCHINSON AND JUDY HUTCHINSON, APPELLEES.

443 N.W.2d 611

Filed August 4, 1989. No. 87-846.

Pleadings: Demurrer. It generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. VONDRASEK, Judge. Judgment of District Court reversed, and cause remanded with directions.

John F. Recknor, of Barlow, Johnson, DeMars & Flodman, for appellant.

Jay L. Welch, of Rickerson, Welch & Kruger, for appellees.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

GRANT, J.

This is a lawsuit about $540. Plaintiff school district wants defendants to pay for the transportation of defendants' three children to and from the Waterloo school. Defendants do not want to pay.

On November 6, 1986, plaintiff-appellant filed its petition seeking recovery of moneys from defendants for transportation of their children. On December 18, 1986, defendants demurred.

On January 20, 1987, the county court for Douglas County

sustained the demurrer and dismissed plaintiff's case. The court's order stated in part:

> The issue raised by the Demurrer is:
>
> "May a Class III School District which is providing busing service to resident students charge a fee for transporting the students?"
>
> It is the finding of the Court that school boards are under no statutory duty to provide actual bus service to students, and if the board in its discretion elects to provide busing service, there is no statutory authority to charge for the transportation.
>
> IT IS THEREFORE ORDERED that the Demurrer is sustained for the reason that the Petition does not state facts sufficient to constitute a cause of action. The Petition of Plaintiff is dismissed. All costs taxed to Plaintiff.

The order did not provide an opportunity for the plaintiff to amend its petition if it so desired.

Then began a series of events which primarily concern thrashing around in a legal thicket without either side presenting any clear issue for a court to decide. Plaintiff did not file motion for a new trial or motion for the court to set aside its judgment. On February 10, 1987, plaintiff filed a motion, apparently by mail, seeking an order "allowing plaintiff to file an amended petition. A copy of the proposed amended petition is attached hereto . . . ." The certificate of service attached to the motion set out a hearing to be held in February.

On February 11, 1987, the county court entered an order providing, in part, as follows:

> Hearing held on plaintiff's motion to file an amended petition. Defendants appeared through their attorney Jay L. Welch. Plaintiff did not make an appearance. Motion submitted without argument and allowed.
>
> The amended petition attached to the motion is hereby filed by this order. Defendants requested and allowed to file a demurrer to the amended petition by February 17, 1987.
>
> Hearing on the demurrer to the amended petition set for hearing at 11:00 A.M. February 27, 1987 before the

undersigned in Courtroom No. 21.

On February 19, 1987, at 10:50 a.m., defendants filed their demurrer to the amended petition. Also on February 19, at 10:13 a.m., plaintiff filed its notice of appeal to the district court for Douglas County "from an Order entered herein on January 20, 1986 [sic], which sustained a Demurrer filed by the defendants herein." Plaintiff deposited a docket fee at the same time and filed a praecipe for transcript. The notice of appeal and docket fee were timely filed to give the district court jurisdiction over plaintiff's appeal from the county court's order of January 20, 1987, and the filings removed the case from the jurisdiction of the county court.

Another praecipe for transcript was filed on March 16, 1987, in the county court, requesting seven items, including "Order of the Court sustaining the Demurrer to the Amended Petition which Order was dated February 27, 1987." The February 27 order sustained defendants' demurrer to the amended petition and dismissed the amended petition. The demurrer and order were filed after the notice of appeal to the district court filed February 19, 1987, and the county court had no jurisdiction to enter such an order.

In any event, on August 19, 1987, the district court entered its order as follows: "Order of County Court sustaining defendant's [sic] demurrer is affirmed." On August 24, 1987, plaintiff filed a motion for new trial. On August 31, 1987, plaintiff's motion for new trial was denied. Plaintiff filed its notice of intent to appeal on September 18, 1987. This filing was made within 30 days of the district court's order of August 19, 1987, affirming the county court order, and therefore, the problem presented in *Collection Bureau of Lincoln v. Loos, ante* p. 30, 443 N.W.2d 605 (1989), is not before us. It should be noted that plaintiff's motion for new trial, filed in the district court, is not an appropriate pleading when the district court is acting as an appellate court.

This case points out the pitfalls of practicing law by mail and the great difficulties facing a trial judge (in this case the county judge) in deciding cases which, on some points, are not even orally argued or explained. This court is faced with a confusing welter of pleadings. It would appear that if a case is sufficiently

important to be filed in the county court, appealed to the district court, and then appealed to the Supreme Court of this state, the case should be submitted succinctly and properly so that some court can dispose of it without the surrounding fog of confusion in this case.

The dispositive issue in this case is plaintiff's assignment of error that the trial court erred in that it offered no legally adequate opportunity for plaintiff to file an amended pleading. Plaintiff assigns this action of the trial court as one of its seven assignments of error. Since the resolution of that assignment is dispositive, we reverse on that ground and do not discuss plaintiff's six other assigned errors.

In *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 183, 302 N.W.2d 697, 701 (1981), we held, in connection with a demurrer ore tenus:

> "It 'generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.' [Citation omitted.] We feel the ends of justice will be served in this case by permitting plaintiff to amend its petition."

In *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981), we again stated that leave should ordinarily be granted to amend a petition after a demurrer is sustained, especially with respect to an original petition. In the *Fowler* case, the court noted that, on appeal, the case involved the sustaining of a demurrer to the plaintiff's third amended petition without permitting further amendment. In the cause before us, only the original petition was properly before the county court and the district court reviewing the county court dismissal.

In the cause before us, the issues are difficult enough that there is a reasonable possibility that a cause of action could be stated. In defendants' demurrer to that petition, defendants allege:

> Defendants Demur to Plaintiff's petition because the petition fails to state a cause of action upon which the Plaintiff is entitled to recover, i.e., Plaintiff School

> District is without lawful authority, and is engaging in conduct ultra vires in charging for bus service to transport students residing within Plaintiff's school district boundaries to and from regular school attendance at the Plaintiff's schools.
>
> Further, the Defendants Demur to the petition of the Plaintiff because the said petition alleges an unreasonable classification among students entitled to various transportation benefits from the Plaintiff School District for attendance at its schools, which unreasonable classification is by its unreasonableness, in violation of the equal protection clauses of the constitutions of the State of Nebraska and the United States of America.

Such issues are convoluted enough to permit plaintiff another attempt to plead a case. Indeed, defendants' demurrer might well be injecting factual matters into the case in defendants' attempt to prevail. The issue should be refined enough in the trial court, and before the appellate district court, to allow both of those courts, and this court, a reasonable opportunity to dispose of the case properly.

We note that plaintiff itself caused a major part of the problem by not so conducting itself as to permit appropriate amended pleadings in the trial court. Nonetheless, the decision of the district court affirming the judgment of the county court is reversed. The cause is remanded to the district court with directions to remand the cause to the county court to permit plaintiff the opportunity to file an amended petition.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF AUGUST P. GOLTL, DECEASED. MARJORIE L. GRAY, APPELLANT, V. ADRIAN P. GOLTL, PERSONAL REPRESENTATIVE OF THE ESTATE OF AUGUST P. GOLTL, DECEASED, APPELLEE.

443 N.W.2d 884

Filed August 4, 1989. No. 87-1066.

1. **Decedents' Estates: Appeal and Error.** In an appeal from a county court's decision of a probate matter as a law action, an appellate court reviews the county court's decision and judgment for error appearing on the record in the county court.
2. **Courts: Judgments: Appeal and Error.** On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court. Neb. Rev. Stat. § 24-541.06 (Reissue 1985). A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.

Appeal from the District Court for Morrill County, ROBERT R. MORAN, Judge, on appeal thereto from the County Court for Morrill County, RICHARD P. MYERS, Judge. Judgment of District Court affirmed.

George A. Sommer for appellant.

Robert J. Bulger, of Bulger & Jensen, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

On July 15, 1982, as the result of a written assumption agreement, Marjorie L. Gray and August P. Goltl jointly assumed a mortgage held by Platte Valley Federal Savings and Loan Association on property in Scotts Bluff County, Nebraska. August Goltl died on March 25, 1984. After Gray had defaulted in the mortgage payments, Platte Valley foreclosed its mortgage and sold the property, leaving a deficiency in excess of $20,000, for which Gray and Goltl's estate were jointly and severally liable under the assumption agreement. Gray filed a claim against Goltl's estate and, based on an alleged oral indemnification agreement resulting from promissory estoppel, sought indemnification for Gray's

payments on the mortgage. Adrian P. Goltl, personal representative of Goltl's estate, disallowed Gray's claim. Gray filed a petition in the county court for allowance of her claim. After a hearing, the county court denied Gray's claim and dismissed her petition. On appeal, the district court upheld the decision of the county court. Gray appeals, contending that her claim against Goltl's estate should have been allowed.

In an appeal from a county court's decision of a probate matter as a law action, an appellate court reviews the county court's decision and judgment for error appearing on the record in the county court. *In re Estate of Miller*, 231 Neb. 723, 437 N.W.2d 793 (1989). See, also, Neb. Rev. Stat. §§ 24-541.06 (Cum. Supp. 1988) and 25-1911 and 30-1601 (Reissue 1985).

> On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the "case for error appearing on the record made in the county court." Neb. Rev. Stat. § 24-541.06 (Reissue 1985). A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.

Holden v. Urban, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987). See, also, *Justice v. Hand*, 227 Neb. 856, 420 N.W.2d 704 (1988); *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989).

Having reviewed the record, we find no error in the county court's decision which denied Gray's claim. For that reason, the judgment of the district court, upholding the decision of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. INGREAT N. SWIFT, APPELLANT.

443 N.W.2d 613

Filed August 4, 1989. No. 88-631.

Convictions: Appeal and Error. In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Marie C. Pawol for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Defendant-appellant, Ingreat N. Swift, was convicted by a jury on June 6, 1988, in the district court for Douglas County of the offense of being a felon in possession of a firearm in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1985). An enhancement proceeding was held on July 8, 1988, after which the defendant was found to be a habitual criminal in violation of Neb. Rev. Stat. § 29-2221 (Reissue 1985). The defendant was sentenced to 10 years in the Nebraska Penal and Correctional Complex.

A single error has been assigned by the defendant. He contends that there was insufficient evidence as a matter of law to sustain his conviction. We affirm.

The record shows that on the night of August 26, 1987, an argument broke out in an Omaha bar between the defendant and another man. The bouncer of the bar was an employee of the bar with the duty to maintain order in the barroom. He testified as follows:

A. Yes, Mr. Swift was talking, discussing with another

guy very loudly about something another guy had did to his sister.

Q. OK, what happened next?

A. I asked them to please turn their voices down because, you know, if you get loud and stuff like that, we have to remove them from the establishment. And they kept on going. I removed one person. He left freely of his own free will. That was the one Mr. Swift was arguing with. He left.

Q. All right.

A. Mr. Swift did not want to leave.

Q. OK, and what happened next?

A. I had turned around, you know, to check the door because we accept money for people coming in. On that night it was very crowded, so I had door duties, so I turned around and looked towards the door. The next thing I know, a gun was raised towards my head, and I turned around, and I caught the butt right in the—right up here, caught it in my scalp.

Q. OK, did it cause any type of injury?

A. Oh, yes.

Q. OK. Is there any scar still from that?

A. Yes, a permanent scar.

Q. OK. Turn so—and point to where that is; show the jury where that is. And how'd you get that scar?

A. (After showing the jury) The butt of a—something like a Luger. Automatic weapon.

Q. Who was holding it?

A. Mr. Ingreat Swift.

A struggle ensued between the bouncer and the defendant. During the struggle the gun discharged, and a bullet struck a wall near the bathroom. The bouncer wrestled the gun from the defendant and placed it on the bar, and the bouncer held the defendant to the floor until the police arrived.

The manager of the bar testified that at approximately 11:25 p.m. he heard a gun go off. The gun was thrown across the floor during the struggle between the bouncer and the defendant, and somebody evidently picked up the gun and placed it on the bar counter. The manager testified that he took

the gun from the counter and retained it until the police arrived.

Four Omaha police officers testified at the defendant's trial. These officers testified that upon their arrival two men were observed fighting on the floor. The officers testified that they broke up the fight, and the defendant was placed in custody.

Defendant did not testify, nor was any evidence adduced by the defense. It is clear that there was evidence showing that defendant was in possession of a firearm on the night in question. Defendant stipulated at the trial that he had previously been convicted of a felony. We have often held that in reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Botts,* 232 Neb. 802, 442 N.W.2d 384 (1989); *State v. Bowen,* 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Wickline,* 232 Neb. 329, 440 N.W.2d 249 (1989). We determine that the evidence was sufficient to support defendant's conviction.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVA MAXINE BOSTWICK, APPELLANT.

443 N.W.2d 885

Filed August 4, 1989. No. 88-840.

1. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
2. _____: _____. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

3. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
4. **Postconviction.** Proceedings under Nebraska's Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1985), are civil in nature.
5. **Constitutional Law: Postconviction: Speedy Trial.** The speedy trial provisions of the sixth amendment to the U.S. Constitution, Neb. Const. art. I, § 11, and the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1205 et seq. (Reissue 1985), apply only to criminal trials and, thus, do not apply to postconviction actions.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

James Walter Crampton for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Steva Maxine Bostwick appeals from the district court's denial of her motion for postconviction relief under Nebraska's Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Bostwick claims the court erred in failing to find Bostwick was denied effective assistance of counsel in her jury trial and convictions for second degree forgery and possession of a forged instrument. Bostwick also contends that the district court erred in failing to grant a prompt hearing on Bostwick's postconviction motion, refusing to allow Bostwick to address the court at the hearing on the postconviction motion, and failing to delineate the issues and express findings of fact and conclusions of law in the judgment denying Bostwick's motion.

STANDARD OF REVIEW

A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of

being raised, but were not raised, in the defendant's direct appeal. *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

State v. Dillon, 224 Neb. 503, 507, 398 N.W.2d 718, 720-21 (1987). See, also, *State v. Davis*, 228 Neb. 622, 423 N.W.2d 487 (1988).

FACTS

The account of events at Bostwick's trial and the factual basis for her convictions are contained in *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986), which disposed of Bostwick's direct appeal and affirmed her convictions.

On April 20, 1984, the State charged Bostwick with second degree forgery, Neb. Rev. Stat. § 28-603(1) (Reissue 1985), and possession of a forged instrument, Neb. Rev. Stat. § 28-604(1) (Reissue 1985).

Bostwick was a bookkeeper for Commercial Enterprises, Ltd., a company owned by Gail Hammitt. The instruments involved in the forgery charges were Commercial's checks, bearing Hammitt's apparent signature. The central issue in the case was whether Bostwick had forged Hammitt's signature on the checks.

Disposition of the charges against Bostwick involved three trials. In the first trial, the court granted Bostwick's motion for mistrial after the State had introduced evidence of Bostwick's prior convictions. The second trial ended in a mistrial because the jury was unable to reach a verdict. After the second trial, the court denied Bostwick's motion to dismiss based on prosecutorial misconduct in the first and second trials.

At Bostwick's third trial, through use of handwriting exemplars, which Bostwick had provided to the police department in 1975, and Bostwick's entries in Commercial's ledgers for comparison, the State's handwriting expert identified signatures on the checks in question as Bostwick's handwriting. Bostwick's attorney objected to the 1975 exemplars.

Although the State's handwriting expert apparently had

some prior mental health problems, Bostwick's attorney did not delve into these problems on cross-examination. According to the attorney: "I didn't want to have the jury sympathize with him and get angry at me for bringing something into the case that really didn't need to be in there."

Also during Bostwick's third trial, Hammitt, on cross-examination, mentioned that Bostwick had removed $50,000 from his bank account. As a result of Hammitt's remark, Bostwick's attorney moved for mistrial and asked that the remark be stricken. The court denied a mistrial, but instructed the jury to disregard Hammitt's remark. Although Hammitt had made a similar remark at Bostwick's second trial, Bostwick's attorney made no motion in limine to prevent Hammitt from making the same comment during the third trial. When asked why he failed to make a motion in limine, Bostwick's attorney replied: "[I]t was part of the strategy for the trial to paint Gail Hammitt as someone who was undercapitalized and who was trying to blame everything on Steva and, as a consequence, when he said something, the more outrageous they were I felt it was better for us in presenting our case."

Police officers testified that before Bostwick's arrest, they waited in a police cruiser outside her home. When Bostwick came out of her home, she saw the cruiser and began running away. Police followed Bostwick, apprehended her, and found checks bearing Hammitt's apparent signature in her purse.

Bostwick testified at her third trial that she had not signed the checks in question, denied running from police immediately before her arrest, and otherwise contradicted the arresting officers' accounts about Bostwick's arrest. Bostwick's attorney did obtain photographs of the arrest scene, but not until 6 months later, and he did not call witnesses to refute the police officers' testimony concerning Bostwick's arrest. According to Bostwick's attorney:

> Steva and I had a lot of conversations about the story involved or regarding her arrest. It was her opinion that that was a critical portion of the case. It was my opinion that her story of the arrest was going to cast serious doubts about her credibility. I talked with jurors after the first and

> second trials and I wrote her a letter and I told her that one of the things that the jury had real difficulty in buying was her story about the arrest. They just felt that her credibility was placed into serious question by her explanation of the episode and I tried not to follow that particular approach.

On cross-examination, Bostwick admitted her two prior felony convictions for grand larceny.

According to Bostwick's postconviction motion, the prosecutor, during closing argument, "continually wav[ed] the 1975 Handwriting Exemplars in front of the jury bringing excessive attention to them," and mentioned Bostwick's prior felony convictions introduced during Bostwick's cross-examination. Bostwick's attorney did not object to the prosecutor's closing argument and explained his reasons for declining to do so:

> Well, anything that has been marked as an exhibit and has ben [sic] introduced into evidence can be properly used and argued before a jury in closing argument and a prosecutor typically doesn't try to introduce evidence that is not going to be prejudicial to the defendant, so everything that they wave in front of the jury and every argument that they make is going to be prejudicial and that ground alone isn't going to be sufficient for an objection in their closing argument.

As a result of Bostwick's third trial, she was convicted and sentenced to two concurrent terms of 15 to 25 years' imprisonment as a habitual criminal. See Neb. Rev. Stat. § 29-2221 (Reissue 1985) (habitual criminal penalty—10 to 60 years' imprisonment).

On direct appeal of her convictions, Bostwick's lawyer argued that the trial court erred in admitting the 1975 handwriting exemplars as exhibits and in refusing to grant Bostwick's motion for a mistrial on account of Hammitt's response on cross-examination. In the direct appeal, however, Bostwick's lawyer did not provide this court with the bill of exceptions from Bostwick's first trial, which reflected the prosecutor's remarks about Bostwick's prior convictions. Bostwick's lawyer did not argue that Bostwick's sentence, which

was within statutory limits, was excessive and did not argue that the court erred in failing to grant Bostwick's motion to dismiss the charges based on prosecutorial misconduct in the first and second trials. However, Bostwick made the argument regarding prosecutorial misconduct in her pro se brief filed in her direct appeal to this court.

This court rejected all of Bostwick's arguments, determined that the handwriting exemplars were properly received as evidence and that Bostwick's motion for mistrial, based on Hammitt's remarks in the third trial, was properly overruled, and concluded that the prosecutor's conduct in the first and second trials did not necessitate dismissal of the charges against Bostwick or reversal of her convictions.

Bostwick filed a motion for postconviction relief on May 30, 1986, alleging that her lawyer in the third trial was ineffective in failing to move for dismissal after the first trial, to file a motion in limine regarding Hammitt's remark about Bostwick's stealing $50,000, to successfully exclude the 1975 handwriting exemplars, to cross-examine the State's handwriting expert regarding his mental health, to object to the prosecutor's closing argument, to research and raise on appeal the issues of prosecutorial misconduct and excessive sentence, and to provide a complete record of the first trial for review in Bostwick's direct appeal to this court.

In the postconviction proceeding, Bostwick, on February 22, 1988, filed a notice to take her deposition, which was taken on February 26. On June 6, 1988, Bostwick completed her corrections of and additions to her deposition.

Neither before nor at the postconviction hearing on August 5, 1988, did Bostwick make any objection regarding timeliness of the hearing on her motion for postconviction relief. At the hearing, Bostwick's deposition and the excerpt from the bill of exceptions for her first trial which Bostwick claims should have been included in the record reviewed in her direct appeal were received in evidence. Although present at the hearing on her postconviction motion, Bostwick did not testify. After closing arguments, Bostwick's attorney asked the court's permission for Bostwick to address the court. The court refused the request and stated: "I think I have heard enough argument now. She

has certainly been given time to tell everything and I am not going to listen to any more testimony because the testimony is closed. I have heard enough argument and I am ready to take this under advisement."

The court denied Bostwick's motion for postconviction relief, stating: "Defendant's motion for post-conviction overruled and found to be without any merit." The court made no other findings of fact or conclusions of law with regard to Bostwick's motion.

CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

> [T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

State v. Hawthorne, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988). "To sustain a claim of ineffective assistance of counsel, the defendant has the burden to present a record which shows counsel's deficient performance in representing the defendant." *State v. Uwanaka*, 230 Neb. 808, 809, 433 N.W.2d 540, 541 (1989).

As we noted in *State v. Hawthorne, supra*:

> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. . . ."

Hawthorne, supra at 347, 431 N.W.2d at 633 (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Without restating each of Bostwick's contentions, we find

that Bostwick has failed to show prejudice from any of her lawyer's alleged errors or omissions. For that reason, Bostwick's claim of ineffective assistance of counsel is without merit.

BOSTWICK'S HEARING

Bostwick claims several procedural errors regarding the hearing on her motion for postconviction relief, such as denial of a prompt hearing, the court's refusal to allow Bostwick to address the court, and the court's failure to delineate issues and make findings of fact and conclusions of law in its order denying Bostwick postconviction relief.

Section 29-3001 provides:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.
>
> Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of sections 29-3001 to 29-3004 [the Nebraska Postconviction Act] shall be civil in nature. Costs shall be taxed as in habeas corpus cases.
>
> A court may entertain and determine such motion without requiring the production of the prisoner, whether

or not a hearing is held. Testimony of the prisoner or other witness may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

Proceedings under the Postconviction Act are civil in nature. *State v. Casper*, 219 Neb. 641, 365 N.W.2d 451 (1985); *State v. Huffman*, 186 Neb. 809, 186 N.W.2d 715 (1971). The speedy trial provisions of the sixth amendment to the U.S. Constitution, Neb. Const. art. I, § 11, and the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1205 et seq. (Reissue 1985), apply only to criminal trials and, thus, do not apply to postconviction actions. Nevertheless, Bostwick claims that the State denied her a "prompt hearing" required by the Postconviction Act. Not only did Bostwick fail to object regarding timeliness of her hearing, but she also has failed to demonstrate how she was prejudiced by the period of pendency from the filing of Bostwick's postconviction motion until disposition of the motion. In addition, much of the delay appears to have been caused by Bostwick herself, not by the court or the State. For those reasons, Bostwick's claim that she was denied a prompt hearing has no merit. Regarding Bostwick's claim that she was denied the opportunity to address the court at her postconviction hearing, we note that Bostwick was present at the hearing and expressed her desire to speak only after closing arguments by counsel. Under those circumstances, the court did not abuse its discretion in refusing to allow Bostwick to address the court.

Finally, concerning Bostwick's claim that the district court should have delineated issues and expressed findings of fact and conclusions of law underlying denial of postconviction relief, we note that the court succinctly stated the only finding of fact or conclusion of law necessary for disposition of Bostwick's case, namely, Bostwick's motion for postconviction relief is without merit.

CONCLUSION

Bostwick's motion for postconviction relief is without merit, and the district court's judgment denying Bostwick's motion is affirmed.

AFFIRMED.

MELODY A. JENSEN, APPELLEE, V. MARY LANNING MEMORIAL HOSPITAL, APPELLANT, NEBRASKA COMMISSIONER OF LABOR, APPELLEE.

443 N.W.2d 891

Filed August 4, 1989. No. 88-949.

1. **Employment Security: Appeal and Error.** In an appeal regarding disqualification for benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1988), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court.
2. **Employment Security: Words and Phrases.** The term "misconduct," as used in Neb. Rev. Stat. § 48-628(b) (Reissue 1988), has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests; (2) deliberate violation of rules; (3) disregard of standards of behavior which the employer can rightfully expect from the employee; or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.
3. **Employment Security.** In an employment position which requires close personal contact with persons served by the employer, it is not unreasonable for the employer to require that employees in such positions report for work without the odor of alcohol on their breath. Violation of such a requirement, after warnings to the employee, is misconduct within the meaning of Neb. Rev. Stat. § 48-628(b) (Reissue 1988).

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Reversed and remanded with directions.

Douglas Pauley, of Conway, Connolly and Pauley, P.C., for appellant.

Laureen Van Norman and John F. Sheaff for appellee Commissioner of Labor.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from a decision of the Adams County District Court affirming the decision of the Nebraska Appeal Tribunal granting the plaintiff-appellee, Melody A. Jensen, 10 weeks of unemployment benefits, which had been denied by a Nebraska Department of Labor claims deputy.

Jensen worked as a nursing assistant for the respondent-appellant, Mary Lanning Memorial Hospital (Hospital), the employer, from February 1971 until her termination on May 9, 1988.

Jensen had a history of absenteeism and reporting to work with the odor of alcohol on her breath. After conferences with her nursing supervisor on January 9 and April 14, 1987, Jensen was warned in writing that her conduct must improve. On January 9, 1987, it was suggested, in writing, to Jensen that she "[c]ome to work at 645 [sic] when scheduled and refrain from using alcohol prior to coming to work." In a hospital conference record dated April 14, 1987, and signed by Jensen, Jensen was warned that "[t]he next time [she] comes to work with alcohol odor [on her] breath she will be terminated."

At approximately 6:45 a.m. on May 5, 1988, Jensen reported to work with the odor of alcohol on her breath. Two nurses noticed the smell of alcohol and notified the supervisor. Jensen told the supervising nurse that she had consumed eight or nine mixed drinks the night before and that she had not had any alcohol to drink after 11:30 p.m. the night before. Jensen was sent home, and on May 9, 1988, after a review of the matter, Jensen was officially discharged by the Hospital.

At the hearing, to explain the existence of the odor of alcohol on her breath, Jensen stated that she suffered from periodontal disease. To corroborate this statement, Jensen provided a letter from her family physician, whom Jensen had seen the day after her discharge. This letter stated that Jensen had "moderately severe parodontal [sic] disease" and that "this type of problem can cause persistent mouth odor." In its letter of May 9, 1988, terminating Jensen, the Hospital relied on information to the contrary.

Hospital records showed that during Jensen's tenure she had been absent without excuse 12 percent of the total time of her employment. Hospital records also indicated that Jensen had been repeatedly warned that unless she corrected this problem she would be terminated.

On May 10, 1988, Jensen applied for unemployment benefits from the Nebraska Department of Labor. On May 18, 1988, Jensen was assessed a 10-week benefit disqualification, since

she had been terminated for reporting "to work with the smell of alcohol on [her] breath."

Jensen appealed her 10-week disqualification to the Nebraska Appeal Tribunal on June 3, 1988. A hearing was held before the tribunal on July 7, 1988, and on July 11, 1988, the tribunal entered its decision reversing the claims deputy. The tribunal's decision stated in pertinent part:

> Under the Nebraska Employment Security Law, a disqualification is assessed against a claimant found to have been discharged for misconduct in connection with the work. Neb. Rev. Stat. § 48-628(b) (Supp. 1987). "Misconduct" is such conduct as evinces a willful, deliberate disregard of the employer's best interests, or of the standards of behavior which it has a right to expect of its employees.
>
> Here, the focus of the analysis is on whether the actions of the claimant were willful and whether those actions, if willful, affected the employer's best interest. Drinking prior to going to work would constitute misconduct. Alcohol on the breath is one indication that that individual is under the influence of alcohol while working. However, this Tribunal is of the opinion that additional facts must be demonstrated in order to show that the claimant was under the influence of alcohol. Except for the odorous breath, the claimant appeared to be functioning normally on the day of termination. Furthermore, there is some evidence in the record that a gum disease may be causing the breath odor. Thus, the claimant might be unable to prevent bad breath.
>
> The evidence here does not demonstrate that the claimant's actions were willful and that the claimant was under the influence of alcohol. Therefore, the Determination of the Claims Deputy should be reversed.

On August 11, 1988, the Hospital filed an appeal in the Adams County District Court, and on October 17, 1988, the district court entered an order, apparently adopting the findings of the tribunal and affirming the decision of the tribunal.

The Hospital timely appealed to this court, assigning as error the district court's finding that the evidence did not support a

finding that Jensen was guilty of misconduct. We reverse and remand with directions.

In an appeal regarding disqualification for benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1988), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court. *O'Keefe v. Tabitha, Inc.*, 224 Neb. 574, 399 N.W.2d 798 (1987). That rule has apparently not been changed by the amendment of Neb. Rev. Stat. § 48-638 (Reissue 1988) and the repeal of Neb. Rev. Stat. § 48-639 (Reissue 1988), which changes were effective July 1, 1989.

Section 48-628(b) provides that an individual shall be disqualified for unemployment benefits

> [f]or the week in which he or she has been discharged for misconduct connected with his or her work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each case according to the seriousness of the misconduct, except that if the commissioner finds that such individual's misconduct was gross, flagrant, and willful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits with respect to wage credits earned prior to such misconduct.

In *Stuart v. Omaha Porkers*, 213 Neb. 838, 840, 331 N.W.2d 544, 546 (1983), we held:

> While the term "misconduct" is not specifically defined in the statute [§ 48-628(b)], it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

See, also, *O'Keefe v. Tabitha, Inc., supra*; *Snyder Industries, Inc. v. Otto*, 212 Neb. 40, 321 N.W.2d 77 (1982).

We must determine from the record whether Jensen's

conduct amounted to "misconduct," as used in § 48-628(b). We agree with the tribunal's determination that while Jensen had a history of absenteeism and tardiness, that history seemed to be a secondary reason for Jensen's termination.

We hold that it is misconduct for employees to report to work with the odor of alcohol on their breath after having been warned not to do so. In *Federoff v. Rutledge*, 332 S.E.2d 855 (W. Va. 1985), a maintenance foreman of a coal mine had been terminated for reporting to work with alcohol on his breath. The employee's position was that he was not intoxicated on the job. The court held:

> The appellant's defense that he did not report to work intoxicated or drink on the job is no defense to the charge that he ignored previous oral warnings not to report to work in such an odoriferous condition. Being employed in a position with supervisory duties, such as the appellant in the instant case, or being in a position where one is in contact with the employer's customers, particularly compels such a determination.

332 S.E.2d at 858.

The court held that under West Virginia law, "reporting to work smelling of alcoholic beverages, after previously being admonished not to do so, supports a determination that an unemployment claimant was discharged for ordinary misconduct and thereby subject to a six-week disqualification from the receipt of benefits." *Id.* See, also, *Neville v. Bd. of Review*, 143 Ill. App. 3d 548, 494 N.E.2d 512 (1986).

Jensen, as a nursing assistant, necessarily came into close personal contact with hospital patients. Whether she was intoxicated or not, the Hospital was not unreasonable in requiring such an employee report to work without the odor of alcohol on her breath. Such an odor, detected at close range by a hospital patient, could well cause personal distress to the patient and weaken the patient's confidence in the abilities of the hospital's employees to properly care for patients entrusted to the hospital for treatment. The tribunal's determination that Jensen was not intoxicated at work is not dispositive of the issue.

We hold that in an employment position which requires close

personal contact with persons served by the employer, it is not unreasonable for the employer to require that employees in such positions report for work without the odor of alcohol on their breath. Violation of such a requirement, after warnings to the employee, is misconduct within the meaning of § 48-628(b).

The decision of the Adams County District Court is hereby reversed, and the matter is remanded with directions to enter an order remanding the case to the Nebraska Appeal Tribunal for the entry of an order disqualifying Jensen from receiving unemployment benefits for a period of 10 weeks.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissents.

PHILLIP H. ALLEY, APPELLANT, V. DAVE TITTERINGTON ET AL., APPELLEES.

443 N.W.2d 615

Filed August 4, 1989. No. 88-971.

1. **Workers' Compensation: Appeal and Error.** Findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas R. Lamb, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from an order entered by a three-judge panel of the Nebraska Workers' Compensation Court dismissing the petition of the plaintiff employee, Phillip H. Alley. On December 11, 1987, Alley filed his petition against "Dave Titterington, Dave's Contracting," seeking compensation for injuries he alleged were sustained while he was employed as a carpenter. The pleadings show that the employer is either Dave Titterington, doing business as Dave's Roofing & Contracting, or Dave's Roofing & Contracting and D.K. Titterington. The defendant or defendants will be referred to as the employer.

Alley timely appeals, assigning three errors, which may properly be summarized as contending that the order of the panel reversing the award of the single judge and dismissing the petition was not supported by the evidence. We affirm.

Alley testified that on July 31, 1987, he was on the roof of a house in Lincoln with a fellow employee, Robert Havner, when Havner struck him in the face. After being hit, Alley testified, he did a deep, twisting knee bend to prevent himself from falling off the roof, which caused him to feel a sharp pain in his lower back. Alley looked up to see Havner falling from the roof. Alley stated that he was able to grasp the wrist of Havner and pull him back to safety and that as he pulled Havner to safety, Alley felt a pain in his lower back and felt the pain rise up into his shoulder area.

Titterington, apparently the proprietor of Dave's Roofing, lived a few doors down from the jobsite. Alley stated that he left the jobsite and reported the incident to Titterington. Alley then testified that both he and Havner went back to work and that for the rest of the day he felt a considerable amount of pain in his lower back and shoulders. Although in pain, Alley continued to work on a full-time basis for the employer until September 3, 1987. On September 10, 1987, Alley was terminated.

The record shows that Alley had injured his lower back while working as a woodcutter in Missouri. Alley moved to Portland, Oregon, and then to Lincoln, Nebraska. While Alley was living at the Lincoln City Mission during September 1986, the

employer hired Alley to work as a temporary laborer for the employer, and on September 26, Alley began working for the employer on a full-time basis.

Titterington testified that he owed Alley $422 in backpay and that in a telephone conversation after Alley had been terminated, Alley had threatened to use the Workers' Compensation Court to collect this money. Titterington also testified that Alley complained of back pain and told stories of his Missouri back injury on a weekly basis, long before the alleged incident. Additionally, Alley testified that he had been accused of reporting that certain work release prisoners working for the employer had been using alcohol and drugs and that this might have been the cause of the animosity between Alley and Havner.

Havner testified that the incident testified to by Alley had never occurred.

Based on this evidence, the panel dismissed Alley's petition, stating in its order that "we are unable to say that the evidence, on this factual situation, preponderates in favor of the plaintiff . . . ."

Findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Gomez v. Kenney Deans, Inc.*, 232 Neb. 646, 441 N.W.2d 632 (1989); *Gloria v. Nebraska Public Power Dist.*, 231 Neb. 786, 438 N.W.2d 142 (1989). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986).

We cannot say from our review of the record that the panel was clearly wrong in holding as it did. There was sufficient evidence to support the panel's findings.

The judgment of the rehearing panel is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. RYAN, APPELLANT.

444 N.W.2d 610

Filed August 11, 1989. No. 86-946.

1. **Criminal Law: Right to Counsel.** An accused is entitled to be represented by counsel at all critical stages of criminal proceedings against him, including sentencing.
2. _____: _____. The exercise of sixth amendment rights to counsel is subject to the necessities of judicial discretion.
3. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
4. **Right to Counsel.** An indigent defendant's right to counsel does not include a right to be represented by counsel of his choice and to be represented by an attorney he likes or with whom he has rapport.
5. **Trial.** It is the duty of a trial court to expedite the trial as much as is possible without infringing upon the rights of the parties to a complete and orderly examination of all the facts and circumstances connected with the case.
6. **Trial: Joinder: Appeal and Error.** The right to a separate trial depends upon a showing that prejudice will result from a joint trial. A motion for a separate trial is addressed to the discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of a showing of an abuse of discretion.
7. **Trial.** A defendant may not make a tactical choice in the conduct of his trial and then, when dissatisfied with the results of his choice, make a different choice.
8. **Constitutional Law: Trial: Joinder.** Pursuant to Neb. Rev. Stat. § 29-2002 (Reissue 1985), two or more defendants may be tried together. There is no constitutional right to a separate trial, and a separate trial will only be granted upon a showing of prejudice.
9. **Trial: Evidence: Parties: Jury Instructions.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.
10. **Trial: Evidence: Jury Instructions.** While the giving of a limiting instruction is mandatory when requested, it is within the trial court's discretion whether to give a limiting instruction contemporaneously with the testimony or in the general instructions to the jury.
11. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
12. _____: _____. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence, may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though

such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

13. **Trial: Evidence.** The responsibility for maintaining the delicate balance between the probative and prejudicial effect of evidence lies largely within the discretion of the trial court.
14. **Rules of Evidence.** There are four factors to be considered in determining admissibility under Neb. Rev. Stat. § 27-404(2) (Reissue 1985): (1) The evidence must have a proper purpose; (2) the evidence must be relevant; (3) the probative value of the evidence must outweigh its potential for unfair prejudice; and (4) the court must instruct the jury to consider the evidence only for the purpose for which it was admitted.
15. **Criminal Law: Jury Instructions: Verdicts: Insanity: Appeal and Error.** It is not error for a trial court to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity.
16. **Criminal Law: Jury Instructions: Intent.** A special diminished capacity instruction need not be given where the jury has been properly instructed on intent as an element of the crime charged.
17. **Constitutional Law: Insanity.** Neb. Rev. Stat. § 29-2203 (Reissue 1985) does not violate either the U.S. or Nebraska Constitution.
18. **Homicide: Insanity: Proof.** Neb. Rev. Stat. § 29-2203 (Reissue 1985) sets out an affirmative defense to the crime of murder and does not require the defendant to disprove any of the elements of the offense with which he is charged.
19. **Criminal Law: Presumptions: Proof: Insanity.** So long as the presumption of innocence is maintained throughout a trial and the State is required to prove all the elements of the crime charged beyond a reasonable doubt, a defendant may be required to plead and prove the defense of insanity, where defendant presents the defense as an absolute bar to the crime charged.
20. **Criminal Law: Trial: Juries: Appeal and Error.** The determination of whether or not a jury should be sequestered during the trial of a criminal case is left to the discretion of the trial court and, absent an abuse of that discretion or evidence of jury tampering or misconduct, that decision will not be reversed on appeal.
21. **Criminal Law: Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
22. **Criminal Law: Jury Instructions: Witnesses: Corroboration: Convictions.** Where a jury has been properly instructed that testimony of an accomplice should be scrutinized closely for possible motives of falsification, the uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction.
23. **Testimony: Juries.** The credibility and weight to be given testimony is a matter for the evaluation and determination of the jury.
24. **Juries: Insanity.** The defense of insanity when interposed by an accused is a question of fact for the jury.
25. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.

26. **Convictions: Appeal and Error.** In determining whether the evidence before a jury was sufficient to support the jury's finding, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury, for these are within the jury's province for disposition, and a jury's verdict must be sustained if evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
27. **Trial: Evidence: Witnesses.** It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury, but also on the examination of witnesses and otherwise during the course of the trial.
28. **Trial: Judges: Recusal.** A judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal.
29. **Constitutional Law: Homicide: Sentences.** The procedure set forth in Neb. Rev. Stat. § 29-2520 (Reissue 1985) does not violate either the U.S. or Nebraska Constitution.
30. **Homicide: Sentences: Appeal and Error.** The determination of whether to request the designation of a three-judge sentencing panel under Neb. Rev. Stat. § 29-2520 (Reissue 1985) is left to the discretion of the district court, and absent a showing of an abuse of that discretion, this court, on appeal, will affirm that decision.
31. **Criminal Law: Constitutional Law: Homicide: Sentences.** A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.
32. **Records: Judicial Notice: Rules of Evidence.** An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2) (Reissue 1985).
33. **Constitutional Law: Sentences: Evidence: Witnesses.** A sentencing court must consider information adduced at trial when exercising discretion in imposing sentence, and there is no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court.
34. **Trial: Presumptions: Appeal and Error.** Without some affirmative showing in the record that a grant of a motion for discovery was violated, this court will presume compliance.
35. **Sentences: Aggravating and Mitigating Circumstances: Proof.** The facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt.
36. **Sentences: Aggravating and Mitigating Circumstances: Evidence.** A sentencing court may not consider the same evidence to support different aggravating factors. However, a sentencing court may consider evidence of distinct incidents to support different aggravating factors.
37. **Sentences: Aggravating and Mitigating Circumstances.** Under the rationale of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), statutory aggravating circumstances must be clearly defined and applied by a

court so as to prevent a sentencing body from exercising discretion that may lead to arbitrary or inconsistent results.

38. _____: _____. "Exceptional depravity" as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."
39. **Homicide: Aggravating and Mitigating Circumstances: Proof.** The "especially heinous, atrocious, or cruel" language of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) is limited to cases where torture, sadism, or the imposition of extreme suffering exists, or where the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.
40. _____: _____: _____. In order for aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Reissue 1985) to be present, the method of killing must entail something more than the ordinary circumstances which attend any death-dealing violence.
41. **Sentences: Death Penalty.** The death penalty may only be imposed under sentencing procedures that do not create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.
42. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** This court's automatic review of capital cases does not require it to set aside a death penalty where certain aggravating factors found to exist below are determined here to be unsupported by the evidence. A finding of a single aggravating circumstance on appeal may be sufficient to support a death sentence.
43. **Homicide: Aggravating and Mitigating Circumstances.** The presence or absence of mitigating factors is not, in any way, an element of the crime of murder.
44. **Sentences: Aggravating and Mitigating Circumstances: Evidence.** A defendant may offer any evidence on the issue of mitigation.
45. **Criminal Law: Trial: Juries: Appeal and Error: Words and Phrases.** Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

Bruce Dalluge, of Morrissey, Morrissey & Dalluge, for appellant.

Robert M. Spire, Attorney General, A. Eugene Crump, and Melvin K. Kammerlohr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

The defendant, Michael W. Ryan, was charged with first degree murder in the death of James Thimm. Thimm died April 29, 1985, after being tortured by defendant and four others for 3 days.

On September 25, 1985, an information was filed in the Richardson County District Court charging defendant with two counts of murder. Count I charged him with the first degree murder of James Thimm, and count II charged him with the first degree murder of Luke Stice. Count II of the information was separated in the trial and is not a part of this appeal, except as defendant's later plea of nolo contendere to second degree murder in that crime is addressed below in connection with defendant's sentencing.

On October 8, 1985, defendant appeared before the Richardson County District Court and entered a plea of not guilty to both counts at an arraignment hearing at which defendant was fully advised of his constitutional rights, including his right to remain silent and not testify or otherwise incriminate himself. On November 27, 1985, defendant filed a "Notice of Insanity Defense." On defendant's motion, the case was moved to Omaha, Douglas County, for trial. On February 24, 1986, the trial of count I of the information, the first degree murder of Thimm, commenced with jury selection. On March 6, 1986, a panel of 12 jurors and 2 alternate jurors was sworn. The trial began on March 10, 1986, and closing arguments were made on April 7, 1986.

On April 10, 1986, the jury returned its verdict finding defendant guilty of the first degree murder of James Thimm. Defendant moved for a three-judge sentencing panel pursuant to Neb. Rev. Stat. § 29-2520 (Reissue 1985). On May 6, 1986, this motion was denied. On April 18, 1986, a motion for a new trial was filed, and after a hearing was held on April 25, 1986, defendant's motion for a new trial was denied.

A sentencing hearing was held on September 15 and 16, 1986, before the trial judge. On October 16, 1986, defendant was

sentenced to death. This court is charged with the review of the Richardson County District Court's judgment, pursuant to Neb. Rev. Stat. § 29-2525 (Reissue 1985). In his brief, defendant has assigned 60 errors, which are grouped into 30 arguments. Each is discussed hereinafter. We affirm the judgment and the sentence.

During the trial, evidence was adduced that established the chronological order of events leading up to the torture death of Thimm. Evidence in the record as to the group's lifestyle and the events culminating in Thimm's murder are set out chronologically, and the defendant's arguments are considered separately below.

The record shows the following. Defendant was described as the leader of a group, characterized at trial as both a religious cult and a band of criminals, living on a farm outside of Rulo, in Richardson County, Nebraska. The cult largely developed out of the teachings of Rev. James Wickstrom, the self-proclaimed leader of a group which called itself the "Posse Comitatus." See *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117 (1973). Defendant met Wickstrom at a Bible lecture in Hiawatha, Kansas.

Wickstrom's teachings centered around Anglo-Saxon supremacy, the unconstitutionality of income taxes, and the coming Battle of Armageddon. Although Ryan did not agree with all of Wickstrom's teachings, particularly with regard to tax matters, Wickstrom's ideology was the catalyst that formed the Rulo cult's belief system. As a result of his involvement with the Posse Comitatus, defendant met James Haverkamp, John David Andreas, Ora Richard (Rick) Stice, and James Thimm during 1982 and 1983. In June of 1983, Ryan and some of the other members of the group met with Wickstrom at a large meeting of the Posse Comitatus in Wisconsin.

During the Hiawatha meeting, Wickstrom showed Ryan what was known as the arm test. That test was described as follows. Defendant would face a group member, who would extend his right arm out at approximately a 90-degree angle from his or her body. Defendant would then place his left hand on the member's right shoulder and place his right hand on the member's right wrist. After asking Yahweh (the name used by

defendant and his group for God) a question, defendant would apply pressure to the person's right arm. If the arm dropped, the answer to the question being asked of Yahweh was "no"; if the person's arm stayed up, the answer was "yes." As time went on, others in the group used this arm test, and after awhile every aspect of the lives of the Rulo group was controlled by the use of the arm test.

Sometime in 1983, defendant began telephoning the individuals who later constituted the Rulo group with "orders from headquarters." Defendant would tell the person he called that he (defendant) had "talked to Yahweh and [the men were] supposed to go out and do some stealing . . . ." If any of the men refused to go on these stealing raids, defendant would remind them that their families would not be safe if they angered Yahweh.

The men, in keeping with the group's plans to build a "base camp," converted the spoils of these thefts into weapons, ammunition, and clothing and began to stockpile those items in preparation for the Battle of Armageddon. These stealing raids were conducted in the states of Kansas, Missouri, and Nebraska. The thefts involved the stealing of cattle, hogs, and various large items of farm machinery and construction equipment. Many of those items, including all the stolen livestock, were sold, and the proceeds financed the stockpiling mentioned above. At the time of defendant's arrest, officers recovered stolen property with a value in excess of $120,000 at the Rulo farm.

By the summer of 1983, it was determined, through the arm test, that defendant had the spirit of the Archangel Michael. Defendant also told the group that he could communicate directly with Yahweh through his mind.

The group began to meet each Saturday to study the Bible. These meetings were conducted by defendant and were usually attended by James Haverkamp; his sisters Cheryl Gibson and Lisa Haverkamp; his mother, Maxine Haverkamp; defendant's wife, Ruth; and defendant's three children. James Haverkamp's younger brother and father would also attend, as did Thimm, Andreas, Rick Stice, Stice's children, and Stice's girlfriend.

During these meetings, defendant would read and interpret various verses of the Bible. He told the group that "the Jews added" any passages that disagreed with his teachings. During these meetings, verses of the Bible were rewritten to conform to the group's beliefs. At the conclusion of these meetings, the group would smoke marijuana.

At one of these meetings, held in Kansas, where defendant and his family then lived, defendant took Cheryl Gibson aside and told her that Yahweh wanted her to leave her husband. Defendant used the arm test to determine that in Yahweh's eyes Gibson was not married to her husband, who was "on Satan's side." Defendant also told her that if she did not stay with defendant and Ruth Ryan, her husband and children would be killed in an automobile accident.

Gibson eventually left her husband, and for a time she and her children lived with Michael and Ruth Ryan. In May of 1984, a cult service was held, with Rick Stice officiating, where defendant and Gibson were married in Yahweh's eyes.

In June of 1984, defendant told his wife, Ruth, and Gibson that Yahweh wanted them to get better acquainted by going to the Rick Stice farm outside of Rulo. During the summer of 1984, defendant, Ruth Ryan, the three Ryan children (including Dennis), Rick Stice and his three children, Cheryl Gibson and her five children, James Haverkamp, Lisa Haverkamp, and James Thimm moved to the Rulo farm. In August 1984, John David Andreas and, in October, Timothy Haverkamp, a cousin of the Haverkamps, moved to the farm. This group of 7 adult men (including Dennis Ryan), 3 adult women (Ruth Ryan, Gibson, and 15-year-old Lisa Haverkamp), and 10 young children constituted the basic Rulo group. Maxine Haverkamp was a regular visitor.

In the meantime, in June of 1984, defendant officiated at the cult wedding of Rick Stice and Lisa Haverkamp, and, in August of 1984, defendant took his second cult wife by marrying Cheryl Gibson's mother, Maxine Haverkamp.

The Rulo farmstead included two trailer houses. Rick Stice was determined to be the high priest of the group, and he and Lisa Haverkamp shared a bed in the south trailer. During this period, the remainder of the group lived in the north trailer. The

men slept in a large room known as the barracks, and the women and children slept in various other rooms of the north trailer.

By August of 1984, daily life on the farm was established. The women would consult Yahweh through the arm test in order to determine meal plans, including how long to boil water, and Ryan would use the arm test to find out if any members of the group needed to fast or do penance that day.

Defendant acted as the leader of the group. He would assign tasks for the day and then spend most of his time watching television. During the evenings, defendant would direct the men on stealing raids. Apparently, defendant himself did not participate in the raids.

The group believed that the Battle of Armageddon would take place in the Rulo area, since the Battle of Armageddon was also known as the "Battle of the Wheat Fields." Defendant had observed that there were several wheat fields in the area, and concluded from this that the final battle would be waged near Rulo.

Defendant gave each of the men a military title, and within a few months all of the men were generals, some having attained five star general status, with the exception of Rick Stice, the owner of the farm, who was a six star general and the high priest.

By the fall of 1984, the group had acquired over 75,000 rounds of ammunition and dozens of weapons, including several that were fully automatic. The group also stockpiled seed, charcoal, and enough food to fill a room 20 feet wide by 35 feet long.

During the later part of 1984, Stice lost the Rulo farm due to financial difficulties. The farm was purchased by James Haverkamp and Lynn Thiele, partially with money stolen from James Haverkamp's father. During this same period, defendant determined that Yahweh was angry with Rick Stice; that Stice had raped Stice's cult wife, Lisa Haverkamp; and that Stice was having "bad thoughts." It would appear that one of Stice's more serious transgressions was losing the farm. Defendant demoted Stice and moved Lisa to the north trailer, where she shared a bed with Ruth Ryan and Cheryl Gibson.

In December of 1984, defendant took Lisa Haverkamp as his third cult wife, and on June 25, 1985, Ryan took his fourth cult wife by marrying Debra Thiele, the sister of Cheryl and Lisa. By this time, defendant was considered married to Cheryl, Lisa, and Debra and to their mother, Maxine Haverkamp, and Ruth Ryan, whom he married in a conventional ceremony in about November of 1967. Maxine did not live on the farm, but would come to the farm twice a month, apparently to perform her conjugal activities.

In December of 1984, defendant announced that Lisa Haverkamp was the queen of Israel. On New Year's Eve, defendant told the group that he and Lisa had spoken to Yahweh, and Yahweh had said that there were going to be changes on the farm. After the group smoked marijuana, defendant informed them that unless the jealousy stopped the law would come and that the children would be taken away. Defendant told the group that each individual had to make a decision on whether to remain or leave the farm; that Yahweh had indicated that anyone who elected to leave would "burn in hell"; and that if an individual elected to stay, he or she would have to stay with the group forever. Defendant said that if anyone decided to stay and then left, he would "hunt [them] down and kill [them]."

During a Saturday Bible meeting, James Thimm stated that he was not sure there was a Yahweh and expressed doubts in the arm test. Rick Stice's 5-year-old son, Luke Stice, also apparently had expressed doubts about Yahweh. After these incidents, in January or February of 1985, Thimm, Rick Stice, and Luke Stice were moved to the south trailer. Both Thimm and Rick Stice were demoted to "slaves," and Luke was called "dog," "mongrel," "gook," or "dogshit." During January and February, apparently as part of the changes Ryan had foretold, Rick Stice and Thimm were made responsible for most of the guard duty, washing of dishes, and care of the chickens and goats.

Evidence showed that about this time, defendant began to abuse Thimm, Rick Stice, and Luke Stice. Defendant threatened to amputate Rick Stice's penis and threatened to skin and then burn Luke Stice alive, and both Thimm and Rick Stice

were forced to do calisthenics. In March, defendant instructed Thimm to have anal sex with Rick Stice, and told Thimm "to make him hurt." Defendant also forced Rick Stice to perform oral sex on his son Luke and forced Luke to perform oral sex on his father while the other men watched. Ryan told the others that Yahweh wanted these acts performed in order to humiliate Thimm and Rick and Luke Stice as punishment for their having "bad thoughts."

Luke Stice died around March 25, 1985, after defendant repeatedly shoved him, causing Luke's head to strike a cabinet. Luke was knocked unconscious the third time defendant shoved him and died sometime during the night. Luke was buried the following morning in an unmarked grave that defendant forced Rick Stice and Thimm to dig.

After Luke's death, defendant forced Rick Stice to copulate with a goat on three different occasions.

During March, defendant and Lisa Haverkamp went to Kansas City for a honeymoon. Defendant left his son Dennis and Timothy Haverkamp in charge at Rulo. While defendant was gone, Rick Stice escaped. After defendant returned, James Thimm was kept chained to the south trailer porch.

After leaving the farm, Stice began to worry about "eternal damnation" and returned to the farm after 7 days. Upon his return, defendant had both Rick Stice and Thimm kept chained to the porch of the south trailer.

On April 4, 1985, Rick Stice escaped a second time after Timothy Haverkamp had taken Stice into town on defendant's orders, so that Stice could cash his Social Security check. Stice did not return to the farm and did not contact authorities until June 26, 1985.

After Stice's escape in April, the treatment Thimm received from defendant continued to deteriorate. Thimm was forced to sleep chained to the porch, was fed small birds the men shot, and was also forced to copulate with a goat. On April 27, 1985, after being accused of poisoning a turkey, Thimm was beaten by the men and taken to the hog confinement building, where he was kept chained for the night. At this time, the adult men present on the Rulo farm were: defendant; Dennis Ryan; Timothy Haverkamp; James Haverkamp; John David

Andreas; and the victim, James Thimm. Ruth Ryan, Cheryl Gibson, and Lisa Haverkamp were the adult women there, and there were nine young children.

On April 28, 1985, defendant sent Andreas out to Thimm with a bowl of granola cereal. Defendant informed the men during breakfast that "Yahweh would be pleased if [Thimm] lasted four or five days." At about mid-morning, defendant and the rest of the adult men went to the hog confinement building. Defendant instructed Thimm to disrobe and to bend over a farrowing crate.

Defendant then told Thimm that he was going to be sexually assaulted with a shovel handle. Defendant then inserted a shovel handle into a grease cartridge and told the men that Thimm had not done a good enough job with the goat and that Yahweh wanted Thimm "probed." Defendant then inserted the shovel handle about 5 or 6 inches into Thimm's rectum and "probed" Thimm for about 30 seconds. When Thimm would not stop fidgeting, defendant tied Thimm's arms to the farrowing crate with baling wire.

Defendant then informed the men that Yahweh had said that he wanted the handle inserted between 8 and 10 inches and had given defendant the order in which each man was to probe Thimm. A tape measure was then used, and the shovel handle was marked. While defendant had the handle inserted in Thimm's rectum, he told Thimm, "I ought to shove this thing up to your heart." (One of the examining pathologists testified that, in fact, the shovel handle was inserted some 2 feet into Thimm.) Each of the remaining four men then took their turns probing Thimm's rectum with the shovel handle. After Thimm screamed a couple of times, defendant kicked Thimm in the head and had furnace tape put over Thimm's mouth so that the men would not have to hear Thimm's cries.

After the probing, defendant instructed Thimm to sign his car title over to Timothy Haverkamp. Thimm did so, and apparently defendant told Timothy Haverkamp that Thimm's car was his birthday present.

Each man, beginning with defendant, probed Thimm again. During this second round of probing Thimm's rectal wall was ruptured. Defendant decided that the handle was being inserted

too far and that they needed an object that was bigger around. Defendant then greased the fat end of a pick handle and inserted it into Thimm's rectum about 3 inches. After this second round of probing, the men left to do some chores and left Thimm chained in the hog confinement shed.

That afternoon defendant told the men that Thimm had not been punished enough. The men returned to the hog confinement building, and Thimm was removed from the farrowing crate and bound to an overhead auger. Each of the five men then gave Thimm 15 lashes with a leather whip. Defendant began the whipping, and with each lash one of the cult members' names was called out. During this whipping Thimm said, "I'm sorry, Yahweh, please forgive me what I've done. Please stop this." Whereupon defendant said, "Well, you don't need to worry about that, because Yahweh's given up on you. You don't have any hope any more."

After this whipping Thimm was untied, given his sleeping bag, and chained up for the night.

During breakfast of the following morning (April 29, 1985), defendant told the men that Thimm had still not been punished enough. The men returned to the hog confinement building, and Thimm was again tied to an overhead auger. Beginning with defendant, each man gave Thimm 15 lashes with the leather whip.

After Thimm had received 75 lashes, defendant said that Thimm had still not received enough punishment. Thimm was forced to lie with his freshly whipped back on the floor. Thimm was then bound to a pipe, and each of the five men lashed Thimm's chest and stomach 15 times.

Defendant then had Thimm's left hand placed and bound palm up on a block of wood. Thimm began to moan, and defendant told him things would only get worse if he did not shut up. Defendant then shot one of Thimm's fingertips off with a pistol. Michael Ryan then instructed each man to shoot off one of Thimm's remaining left hand fingers and his thumb.

After the men had shot off Thimm's fingers, they returned to the north trailer for lunch. At lunch defendant told the men that Yahweh wanted Thimm dead by that afternoon. The men returned to the hog shed; defendant told Andreas to disk over

the field to prepare an area to bury Thimm and told Andreas that he should go say goodbye to his friend James Thimm. When Andreas said goodbye, Thimm was still alive and able to say that he was "sorry."

Defendant then kicked and broke Thimm's arm and told Thimm that he was going to skin a part of him. Defendant put on a pair of yellow kitchen gloves and used a razor blade to make incisions in Thimm's leg, and then used a pliers to pull off strips of Thimm's skin. Thimm was still alive at the time. Defendant then told Dennis Ryan that he could break one of Thimm's legs. Dennis took a rough-cut 2 by 4 board about 7 feet long and proceeded to strike Thimm's leg in the knee area until Thimm's leg broke. Defendant told Dennis Ryan and Timothy Haverkamp that there was an easier way to break a leg. Defendant then placed a block of wood under Thimm's leg and told Timothy Haverkamp to hit Thimm's leg with the 2 by 4. Timothy Haverkamp hit the leg once and it broke.

Defendant then bent down and asked Thimm if he thought Yahweh meant business. Thimm was alive at this time. Defendant then said, "I'll cave his chest in. . . . That's sure to kill him." Defendant then proceeded to stomp on Thimm's chest with his cowboy boots.

Defendant then had James Haverkamp get Thimm's sleeping bag. Timothy Haverkamp testified that Thimm was dead before James Haverkamp returned with the sleeping bag. Defendant placed Thimm's body and clothing into the sleeping bag. Three or four hours later, defendant told the men that Yahweh wanted the grave to be "six foot long by three foot wide and six foot deep." The men dug the grave. Thimm's body was placed in the unmarked grave, and defendant told Timothy Haverkamp to shoot Thimm's body in the head so it would look like an execution. After Thimm's body had been shot in the head, it was covered with dirt.

An autopsy of the body was conducted for the State by George Gamel, M.D., on August 19, 1985, and by William Eckert, M.D., on behalf of the defendant, on September 3, 1985. Both autopsies revealed the following injuries: The anus was markedly dilated; the left hand's fingertips had gunshot-type injuries; the left arm was broken; both legs were

fractured at the thigh level; the head had a gunshot wound, which shot had shattered the left side of the skull; there were multiple rib fractures on both the left and right sides of the chest and back; a blunt object had been inserted far up into the body cavity through the anus, causing damage to the liver; the colon was torn; linear bruises were on the body; and skin had been stripped from one of the legs. The victim's wrists and ankles were still bound with baling wire. The only disagreement between Drs. Gamel and Eckert was whether the victim's penis and scrotum had been cut away or had decomposed. Both pathologists reported that the cause of death was multiple traumatic injuries. Dr. Gamel testified the tear in the colon, the "whipping-like injuries," the gunshot wound to the head, the shock from the broken legs, and the crushed chest were all capable of causing the victim's death independently.

On June 25, 1985, James Haverkamp and Andreas were apprehended while attempting to return to the Rulo farm with a sprayer rig stolen in Kansas. While incarcerated, these men gave law enforcement officials information that was used to secure a search warrant. A team of law enforcement officers composed of FBI agents, Bureau of Alcohol, Tobacco, and Firearms agents, Nebraska State Patrol officers and investigators, and Richardson County sheriff's personnel, assisted by James Haverkamp and Andreas, searched the Rulo farm on August 17 and 18, 1985. On August 18, 1985, James Thimm's nude, partially decomposed body was found, and on September 25, 1985, the defendant was charged with Thimm's murder.

The foregoing facts were testified to by each of the five men involved in the murder. James Haverkamp, Timothy Haverkamp, John David Andreas, Dennis Ryan, and defendant himself each testified, in detail, as to the specific instances of probing, whipping, shooting, kicking, and beating. There is surprising agreement in the detailed facts related by each man.

Defendant's testimony is reflected in 291 pages of the record herein. He sets out his participation in the horrifying acts committed on Thimm and does not deny that the testimony of the other four criminals is generally true. In his testimony, defendant made the following points as to the testimony of the

others, setting out his disagreements with the testimony of the other four. Defendant testified that James Haverkamp was the instigator of most of the thefts, that defendant did not force Andreas to go to the Rulo farm, that the victim and Andreas were not best friends, that defendant did not always lead the Bible studies, that Cheryl Gibson testified against defendant only because she was threatened by the FBI, that defendant did not want to steal, that defendant was tired of the people on the farm and wanted to leave, that Lisa Haverkamp had more power than defendant, that Rick Stice was responsible for the abuse of his son Luke, that it was not defendant's idea for Stice and Thimm to have homosexual relations, and that defendant tried to stop the homosexual activities.

The denials, of course, were as to essentially peripheral activities at the farm. As to the murder incident itself, defendant did not deny and, indeed, specifically testified to the torture itself and to Thimm's death. Defendant did testify, in contradiction to the testimony of others, as to some specific instances. Defendant testified that Yahweh, not defendant, had Thimm chained in the hog shed; that Thimm agreed to his torture; that defendant did not kick Thimm in the head; that Yahweh would not allow the group to drive Thimm off the farm; that Timothy Haverkamp "tore" Thimm open while probing him; that defendant did not stomp on Thimm's chest with his boots; that Andreas and James Haverkamp stomped on Thimm's chest, and Thimm was not breathing after this; that defendant told the group to leave Thimm alone; and that James Haverkamp had the idea of shooting Thimm's fingers off.

Defendant further testified that everyone came to the Rulo farm of their own free will and that he, the defendant, did not intend to kill Thimm.

The defendant argues his 60 assignments of error in 30 separate arguments. While we are primarily concerned with the defendant's assignments of error, that is, defendant's allegations as to the specific actions of the trial court which prejudiced him, we will consider the assignments as defendant sets them out in the arguments in his brief in order to ensure that all points raised on this appeal are considered. After considering all of defendant's assignments, we affirm.

Our review of the record has been complicated due to the way the record has been presented to us. Although complete, the record does not appear to follow any logical order. The pages are not numbered sequentially, several volumes have the same number, and many pages have the same page number. This procedure is a violation of this court's rules. In view of the fact that this is a capital case, however, we have reviewed the record before us. We determine that the entire record ordered by defendant in his praecipe is before this court, and we have not been advised by either party to the contrary.

One cause of this state of disorder appears to stem from the fact that the sentencing judge purported to take judicial notice of the trial record. This procedure is discussed below in defendant's argument XVII. During the defendant's sentencing hearing the evidentiary part of the trial, on the guilt-innocence phase, was marked as exhibit 1. Exhibit 1 consists of 18 volumes with olive-colored covers numbered VIII through XXV, containing trial testimony from pages 1052 through 4542; 2 volumes with tan covers numbered XXX and XXXI, containing trial exhibits 1 through 128 (except exhibit 33); and 1 volume with a green cover numbered XXXII, containing trial exhibits 129 through 143 (except exhibit 142).

That portion of the entire record was marked as an exhibit at the sentencing phase. Necessarily, that part of the record was also fully considered in our review of the guilt-innocence phase of the trial.

Trial exhibits 144, 145, and 146 (not a part of sentencing exhibit 1) are contained in a brown folder numbered XXIX.

The remainder of the record before us consists of the following. The defendant's arraignment is found in the first 13 pages of a 37-page volume with a blue cover numbered I, and a portion of the motion hearings are in the same volume at pages 14 through 37. Progression hearings are found in two volumes with blue covers numbered II and III, containing pages 18 through 399. Motion hearings are found in a volume with a blue cover numbered VI, containing pages 735 through 985, with an additional part in volume I mentioned above. The pretrial conference is found in a volume with a light-blue cover numbered VII, containing pages 986 through 1043. The jury

voir dire is found in four volumes with blue covers numbered II, III, IV, and V, pages 38 through 991, and one volume with an olive cover numbered VIII, with pages 1044 through 1051 containing further voir dire. Opening statements are found in pages 992 through 1052 of blue volume V. Other exhibits, marked in connection with motion in limine hearings, are found in a volume with a blue cover numbered XXVIII, containing exhibits 1 through 143, 147 through 156, and two additional exhibits both marked as exhibit 1 (these exhibits are different from trial exhibits, although they have the same numbers).

The instruction conferences are found in a blue volume numbered V, between pages 1053 and 1112; a volume with a light-blue cover numbered XXVI, containing pages 4543 through 4563; and pages 1301 through 1312 in a volume with a blue cover numbered VI. Closing arguments are found in the same blue volume VI on pages 1113 through 1301. The hearing on the defendant's motion for a new trial is found in blue volume VI at pages 1313 through 1347. The sentencing hearing is found in a blue volume VII at pages 1348 through 1586. The hearing on the defendant's motion for a new trial on the sentencing phase is also found in the same volume VII at pages 1586 through 1589. Sentencing exhibit 1 is the trial itself, and sentencing exhibits 2 through 26 are found in two separate brown boxes.

This listing of the various items in the record in this court shows that the portions of the record requested by the defendant in his praecipe are before us.

I. "*The Defendant cannot be deprived of his constitutional rights to counsel (Assignment #1).*"

Defendant first assigns as error the actions of the trial court in "terminating and dismissing his court-appointed counsel Mr. [Louie] Ligouri" and the actions of the court "directed towards Mr. Ligouri which preceded said termination . . . and which impaired his effectiveness . . . ."

The second part of assignment of error No. 1, as affecting the effectiveness of counsel, is included within assignment No. 2 discussed below. As to the first part of the assignment, the termination of attorney Louie Ligouri, the defendant contends

that he was deprived of his constitutional right to counsel when Ligouri was terminated by the district court on April 25, 1986, after the trial was concluded. Throughout the trial and the preliminary proceedings, defendant was represented by two attorneys, Richard Goos and Ligouri, both of whom had been appointed on October 8, 1985. The record shows that Ligouri had been in practice in Richardson County for 6 years, had tried four criminal jury trials, and had no first degree murder trial experience. Goos was a member of the Lancaster County Public Defender's office and had been in practice for over 24 years, with the 15 years prior to the defendant's trial dedicated exclusively to criminal law. Before this trial, Goos had tried eight or nine first degree murder cases. The record shows that the court treated Goos as lead counsel for the defense.

The defendant was represented by both Ligouri and Goos until, as mentioned above, Ligouri's services were terminated 15 days after the jury had returned its verdict. At the hearing on the termination of Ligouri's services, the court told Goos that if he needed additional help, he should notify the court. The record does not disclose any such request. Goos then continued to represent defendant through the sentencing hearing. On some date not shown in the record, Bruce Dalluge was appointed as cocounsel for defendant. The record does show that both Goos and Dalluge appeared before the court with defendant, as his attorneys, on July 28, 1986, so it is apparent that Dalluge was appointed before that date. Goos withdrew as defendant's attorney sometime after the sentencing hearing, and Dalluge continued to represent defendant on this appeal. Defendant was represented by Goos and Dalluge during his sentencing hearing. It is not apparent from the record why the trial court substituted Dalluge for Ligouri, but the result was that defendant had two attorneys throughout sentencing, as well as two attorneys throughout the trial.

It is settled law that an accused is entitled to be represented by counsel at all critical stages of criminal proceedings against him, including sentencing. *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985). The exercise of sixth amendment rights to counsel is subject to the necessities of judicial

discretion. *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988). While it often happens in this state that two attorneys are appointed to represent a criminal defendant in a capital case, neither the U.S. nor the Nebraska Constitution dictates such a requirement. *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982). The defendant's constitutional right to counsel did not include the right to have the two attorneys representing him throughout the trial also represent him during his sentencing and on the appeal.

In view of the seriousness of the charges and the bizarre nature of the underlying facts, the trial court, acting properly within its discretion, felt that it was appropriate to appoint two attorneys to represent defendant throughout the trial and its preliminaries. In exercising its discretion, the district court then determined that Ligouri's services would then be terminated. For reasons not apparent on the record before us, the trial court later appointed Dalluge as the attorney to continue working with Goos. In view of the terrible, horrifying facts brought out by all the evidence, including defendant's testimony, as to defendant's participation in this crime, it is not possible for this court to hold that the trial court abused its discretion in terminating Ligouri. The reasons for the termination and the subsequent appointment of a different lawyer are not apparent from the record before us, but we are not concerned with the wisdom of the action, but only its legal effect.

To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *State v. Ditter,* 232 Neb. 600, 441 N.W.2d 622 (1989). The defendant has made no such showing, and complains only that he had a better rapport with Ligouri. Such a consideration is irrelevant. An indigent defendant's right to counsel does not include a right to be represented by counsel of his choice and to be represented by an attorney he likes or with whom he has rapport. *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988); *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987); *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983). Defendant has received effective representation.

His concern about the fact he was deprived of the service of an attorney with whom he had rapport does not control the legal issue before us on this point. Defendant's assignment of error with regard to the particular counsel to whom he was entitled is without merit.

II. "*The Court should not interfere with counsel's obligation to zealously represent his client (Assignment #2).*"

As his second assignment, defendant sets out that he was denied "a fair trial and Due Process of Law, Effective Assistance of Counsel, and his right to an Impartial Jury" by the actions of the trial court in "impairment of cross examination . . . ."

The defendant also asserts that the trial court interfered with his counsel's obligation to zealously represent him. Defendant states:

> Throughout the trial the Court curtailed Defendant's counsel from putting on a proper defense. On numerous occasions, Defendant's counsel was denied the right to cross-examine witnesses, was interrupted by the Court without any objection from counsel, and witnesses were allowed to continually answer questions in a [sic] unresponsive manner.

Brief for appellant at 34.

In support of these contentions the defendant cites this court to 10 areas of the record. All 10 of the citations are from the cross-examination of Rick Stice by Ligouri. Defendant, in his second assignment, specifically refers to the court's alleged errors in its conduct during the testimony of Stice. Stice was called by the codefendant Dennis Ryan, and during his direct examination, Stice testified as to his status as "high priest" of the group. During cross-examination of Stice by Dennis Ryan's attorney, that attorney spent 45 minutes attempting to impeach Stice on this issue with testimony Stice had given during a deposition. During the cross-examination of Stice by Ligouri, acting as defendant's attorney, Ligouri asked Stice 20 different times, in several different ways, whether he was a "high priest," and Stice consistently answered that he was to be the high priest after the Battle of Armageddon.

At this point the trial court requested a side bar. The reporter

noted that the record was made in "low tones," and the judge, in apparent frustration, stated, "Who gives a damn whether he was a high priest or not, for God's sake? . . . [Codefendant's counsel] went at him for 45 minutes on the high priest deal. Are you going on for another 45 minutes?" Whereupon the following exchange took place:

> MR. LIGOURI: I want to cross examine him on this. If he is lying about one thing, he's lying about everything.
>
> THE COURT: Mr. Ligouri, keep your tone down, okay?
>
> That's enough on the high priest business.
>
> MR. LIGOURI: I just want to introduce these depositions.
>
> THE COURT: Okay, introduce them.

Assuming testimony concerning whether Stice was the high priest or said he was the high priest was relevant, Neb. Rev. Stat. § 27-403 (Reissue 1985) states that "evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court did not abuse its discretion by terminating the cross-examination of Stice on this issue. At some point, the trial court is entitled to try to bring some order out of chaos. This action of the trial court was no more than that. In *Treppish v. State*, 126 Neb. 21, 33, 252 N.W. 388, 393 (1934), the defendant was charged with first degree murder and claimed on appeal that the trial court "interfered in the examination of defendant's witnesses, continually urging the defendant's attorneys in their examination of witnesses to hurry, and continually interrupting the defendant's attorneys in their examination of witnesses . . . ." In *Treppish*, we stated:

> It is the duty of a trial court to expedite the trial as much as is possible without infringing the rights of the parties to a complete and orderly examination of all the facts and circumstances connected with the case. In his endeavor to expedite the trial in this case, the trial judge used some expressions that perhaps would have been better omitted. However, we are satisfied reversible error cannot be predicated thereon.

Id. at 33-34, 252 N.W. at 393.

The trial court did not abuse its discretion by terminating the continued cross-examination of Stice on whether he was the high priest. Examination of the record shows this assignment of error is without merit and borders on the frivolous.

In his brief, defendant cites the Stice cross-examination as an "example" of the court's interference with his right of cross-examination. Counsel cites us to no other alleged "interference" by the court. We have examined the entire record, and our examination discloses some acrimony between the court and counsel (primarily expressed in hearings outside the presence of the jury), but no prejudicial interference with counsel. Defendant's second assignment of error has no merit.

III. "*After the joinder of two informations which each charge a different Defendant the Court has a duty to sever the cases if it appears either of the Defendants will be prejudiced (Assignments #3, #4, and #5).*"

In his assignment No. 3, defendant contends, in substance, that he was prejudiced by the trial court's failure "to sustain defendant's MOTION FOR SEVERANCE of his case from that of the Co-defendant's during the progress of the trial." His argument makes it clear that defendant's contention is directed to severance of his trial from the trial of his son Dennis Ryan.

Defendant, Michael Ryan, and his son Dennis Ryan could have both been charged with the same act, the murder of James Thimm. Neb. Rev. Stat. § 29-2002(2) (Reissue 1985). Since the charges could have been so joined, it was not error, per se, to try Michael Ryan and Dennis Ryan in a consolidated trial. § 29-2002(3). See *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987).

The record shows that on December 23, 1985, on the motion of the State, the court ordered case No. 2390, count I, State of Nebraska v. Michael W. Ryan; case No. 2384, State of Nebraska v. Dennis Ryan; and case No. 2389, State of Nebraska v. Timothy Haverkamp, consolidated for trial. Defendant objected to the joinder of his case with Timothy Haverkamp's case and moved that case be severed. As to severance of Dennis Ryan's case, the record does not show that defendant initially moved for severance, nor was severance

granted. Defendant admits that while he objected to joinder of his case with Timothy Haverkamp's case, he "did not make any objection at the time to the joinder of his case with his son, Dennis Ryan." Brief for appellant at 36. The record shows that at the conclusion of the State's evidence, defendant's counsel moved that the court

> sever . . . the case of Michael Ryan from the case of his son, Dennis Ryan, on the grounds that it I think became apparent to us, certainly yesterday, that it's going to be very difficult for Michael Ryan to have a fair trial when he is to be tried with his son and when the defense for his son is bringing in inflammatory and irrelevant matters to defend their client.

Defendant's oral motion for severance was then denied.

Defendant's position on severance was amplified during the instruction conference at the end of the trial, when the following discussion was held on the record outside the presence of the jury:

> THE COURT: Well, you didn't complain initially about joining the trials, and I could never understand that.
>
> MR. GOOS: I'm sorry, Judge, what?
>
> THE COURT: Did you — You didn't complain initially about consolidating the trials.
>
> MR. GOOS: Well, we had, tactically, something to gain from that. For example, no death qualification. Apart from legal things, it afforded the defendant a chance to see and be with his son throughout the trial, something that, you know, if he's convicted, he may have trouble seeing that boy for a long, long time, and — And so that he personally wanted a joint trial; and there is another reason which I — I — Well, a reason or two why we were not objecting to the joinder so much.

As stated above, at the close of the State's case, the defendant moved for severance of his case from Dennis Ryan's. A similar problem was present in *State v. Cook*, 182 Neb. 684, 157 N.W.2d 151 (1968), where defendant Cook moved for severance of his case from that involving a codefendant, after both the State and Cook had completed their evidence in the case. This court overruled defendant's motion, stating:

> To permit a defendant to proceed to trial without making a motion for severance and to take his chances on a favorable result in the absence of extraordinary circumstances or surprise would permit a defendant to defeat the orderly processes of justice and defeat the expeditious and constitutional purpose embodied in our severance statute, section 29-2002, R.R.S. 1943. . . . Under our present statute, section 29-2002, R.R.S. 1943, amended in 1957, jointly charged defendants are not entitled to a separate trial as a matter of right but are entitled to a separate trial if it appears that the defendant or the State would be prejudiced by the joining of the offenses or the defendants in a joint trial. The proper rule is stated in State v. Brown, 174 Neb. 387, 118 N.W.2d 328, wherein the court said: "The right to a separate trial now depends upon a showing that prejudice will result from a joint trial. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of a showing of an abuse of discretion. Opper v. United States, 348 U.S. 84, 75 S. Ct. 158, 99 L. Ed. 101, 45 A.L.R.2d 1308 . . . ."

State v. Cook, supra at 688, 157 N.W.2d at 154.

Similarly, in the case before us, there is no reason to let a defendant make a tactical choice in the conduct of his trial and then, when dissatisfied with the results of his choice, make a different choice. It is left to the discretion of a trial court whether the trial of two codefendants should be severed. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988); *State v. Lee, supra*. Pursuant to § 29-2002, two or more defendants may be tried together. There is no constitutional right to a separate trial, and a separate trial will only be granted upon a showing of prejudice. *State v. Clark*, 189 Neb. 109, 201 N.W.2d 205 (1972). A ruling of the trial court regarding severance will not be disturbed without a showing of prejudice. *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976). Defendant was not prejudiced by the joinder of his trial with the trial of Dennis Ryan.

With regard to his assignment No. 4, defendant contends that the trial court erred in refusing "to orally instruct or admonish the jury that evidence pertaining solely to Dennis

Ryan, Co-defendant, should be considered only as evidence against or for Dennis Ryan and not this defendant . . . ." There are two procedural ways that such problems may be handled in a trial involving codefendants. It is not necessary that the judge, during such a trial, give an oral admonition to the jury as to how each item of evidence presented in the case shall be considered by the jury. Whether a judge chooses to do so as the trial progresses is within his discretion. So long as the jury is properly instructed as to how it is to consider such evidence, a defendant's due process rights are not violated. In this case, the judge did instruct the jury, at the conclusion of the case, as to how the jury should consider the evidence as it concerned each defendant.

Defendant points to Neb. Rev. Stat. § 27-105 (Reissue 1985), which states: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

While the giving of a limiting instruction is mandatory when requested, it is within the trial court's discretion whether to give a limiting instruction contemporaneously with the testimony or in the general instructions to the jury. *Lowther v. United States*, 455 F.2d 657 (10th Cir. 1972), *cert. denied* 409 U.S. 857, 93 S. Ct. 139, 34 L. Ed. 2d 102, and 409 U.S. 887, 93 S. Ct. 114, 34 L. Ed. 2d 144.

Defendant's contention that it is a violation of his constitutional rights when the court does not contemporaneously rule on the application of each piece of evidence to one or another of codefendants is without merit.

In his fifth assignment, defendant seems to admit that the trial court had the right to instruct the jury at the end of the case, but contends that the court, in so doing, confused the jury.

NJI 14.54 provides:

> Though the defendants are tried together, it is your duty to consider separately the guilt or innocence of each defendant. Each defendant is entitled to have his guilt or innocence determined from his own conduct and from the evidence which applies to him, as if he were being tried

> alone. Evidence relating to one defendant alone may not be considered against the other defendants. . . . You will not permit any defendant to be prejudiced by reason of the fact that the defendants are jointly charged with a criminal offense.

NJI 14.54A provides:

> In this case . . . defendants are being tried together. During the trial you were told that certain evidence was admitted against one (or more) of the defendants and not against the other(s). You must consider such evidence only in the case of the defendant(s) against whom it was admitted.

During the discussion concerning these instructions the following record was made:

> THE COURT: You wanted 14.54A rather than 14.54.
>
> MR. GOOS: Well, no, I wanted 14.54, but I want it in the language of that — of that instruction, and I wanted that language out of 14.54, that says "During the trial you were told that certain evidence was admitted, . . ." etcetera. And since that was the case, I think it ought to be in the instruction. I see 14.54A as an entirely different separate instruction than — and I would — I'm simply asking the Court instruct — give 14.54 in its entirety, and in addition, give 14.54A.
>
> . . . .
>
> THE COURT: Okay. Then, Instruction Number 6, we combined 14.54 and 14.55A (sic).
>
> MR. REHMEIER: Oh, I see.
>
> THE COURT: I don't think they were ever intended to both be given. Does the State have any objections?
>
> MR. REHMEIER: No, Your Honor.
>
> THE COURT: Defendant Michael Ryan?
>
> MR. GOOS: No objection. What was that number again, Judge?
>
> THE COURT: Six.
>
> MR. GOOS: Number 6? No objection.

Instruction No. 6 reads as follows:

> Though the defendants are tried together, it is your duty to consider separately the guilt or innocence of each

> defendant. Each defendant is entitled to have his guilt or innocence determined from his own conduct and from the evidence which applies to him, as if he were being tried alone. Evidence relating to one defendant alone may not be considered against the other defendant. During the trial you were told that certain evidence was admitted against one of the defendants and not against the other. You must consider such evidence only in the case of the defendant against whom it was admitted. You will not permit any defendant to be prejudiced by reason of the fact that the defendants are jointly charged with a criminal offense.

There was no error or abuse of discretion on the part of the trial judge. The giving of instruction No. 6 adequately charged the jury and must be presumed to have protected the defendant from prejudice. See, *United States v. Buschman*, 527 F.2d 1082 (7th Cir. 1976); *United States v. Weil*, 561 F.2d 1109 (4th Cir. 1977); *United States v. Papia*, 560 F.2d 827 (7th Cir. 1977); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied* 423 U.S. 1050, 96 S. Ct. 777, 46 L. Ed. 2d 638 (1976).

The defendant's counsel agreed to an instruction that acknowledged that the jury had received a limiting instruction. The briefs do not direct us to a part of the record showing that such a limiting instruction was given during the testimony concerning the codefendant.

In reading both NJI 14.54 and NJI 14.54A, we note that NJI 14.54 appears to be the instruction a trial court would give where the jury had not been given a limiting instruction during the trial and that NJI 14.54A, which contains the language "During the trial you were told that certain evidence was admitted against one (or more) of the defendants and not against the other(s)," is intended where the court has instructed the jury during the trial. Defendant, in his fifth assignment, contends that this language confused the jury. We do not determine that it did, but in any event, defendant's counsel agreed to the instruction as given. Defendant's fifth assignment is without merit.

IV. "*The trial court denied the Defendant a fair trial by allowing into evidence irrelevant uncharged crimes, wrongs or acts (Assignment #6).*"

In his sixth assignment of error, the defendant contends that the trial court denied him a fair trial by admitting into evidence uncharged crimes, wrongs, or acts. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Defendant points out that we have held that the admission of irrelevant uncharged misconduct evidence is reversible error. *State v. Moore*, 221 Neb. 706, 380 N.W.2d 288 (1986); *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983); *State v. Stewart*, 209 Neb. 719, 310 N.W.2d 706 (1981). Each of the cases referred to by defendant, however, concerns a defendant tried for crimes the defendant committed alone, and concerns other activities of that defendant. There was no issue in those cases as to the relationship between the named defendant and others, all of whom were engaged in committing the same crime, such as in this case. In this case, in order to present a true picture to the jury of the relative culpability of the five participants in the death of James Thimm, it was appropriate for the State to present evidence showing the relationship of defendant to the other participants. All the evidence presented by the State in the way of defendant's actions which consisted of uncharged crimes tended to show defendant's dominance over the group. Such dominance was shown by defendant's ordering others to engage in such sordid acts as homosexual and bestial conduct—and in the fact that others followed such orders. See *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976).

The State was relying on the testimony of persons engaged in the same actions charged against defendant. Necessarily, the testimony of such criminals was indispensable to the State's case. Testimony before the jury showed that those witnesses were permitted to plead to crimes lesser than murder in the first degree, and the jury was entitled to know of the relative involvement of all involved in this terrible crime. As set out in *State v. Riley*, 199 Mont. 413, 426, 649 P.2d 1273, 1280 (1982):

> We hold that the jury is entitled to view the death of James Gill in the context of prior events and that the beatings inflicted by the other people in the community were not isolated events, but part of a continuous series of beatings inflicted by appellant and others over a period of months. To properly understand the events that took place before James Gill's death, the jury was entitled to consider all of these factors of child abuse prior to the boy's death.

It was also proper for the State to show defendant's dominance of the Rulo group in order to present evidence to the jury with regard to the testimony of the accomplice witnesses. As stated in *U.S. v. Scarfo*, 850 F.2d 1015, 1020 (3d Cir. 1988),

> The other crimes history was relevant to the government's case. If accepted by the jury, the testimony was also damaging to defendant. That impact, however, does not require exclusion here where the evidence was essential in the government's effort to establish the credibility of its disreputable, yet indispensable, witnesses.

Evidence of relevant uncharged misconduct may be admissible, and the admission of evidence of uncharged crimes lies largely within the discretion of the trial court. *State v. Baker*, 218 Neb. 207, 352 N.W.2d 894 (1984); *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). In *State v. Hitt*, 207 Neb. 746, 749, 301 N.W.2d 96, 99 (1981), we held:

> [E]vidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence . . . may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

See, also, *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Nielsen*, 203 Neb. 847, 280 N.W.2d 904 (1979).

In the present case, five individuals took part in the acts resulting in the death of James Thimm. The State was entitled to produce evidence which would show that the defendant was the leader of those who took part in Thimm's murder.

Evidence that the defendant's control over the group included the ability to order sexual assaults, bestiality, and the abuse of a child was probative in that it showed the defendant's absolute power over the group. This evidence was probative of the defendant's overall motive, intent, and plan in his Rulo operation, and demonstrated the circumstances that led to the torture death of Thimm. The responsibility for maintaining the delicate balance between the probative and prejudicial effect of evidence lies largely within the discretion of the trial court. *State v. Williams, supra.*

There is a further reason the evidence of uncharged crimes was admissible. Defendant had entered a plea of "not responsible by reason of insanity." Both for the benefit of the State and the defendant, the jury was entitled to know the circumstances leading up to the murder of Thimm. Without the background of those circumstances, the actual torture death of Thimm would be incomprehensible to a jury hearing just that evidence. The overall relationship among defendant, his accomplices in the murder, and the victim is essential to the understanding of the case by the jury.

The U.S. Supreme Court has set out the requirements for the admissibility of evidence under Fed. R. Evid. 404(b), the equivalent of Neb. Evid. R. 404(2). The Supreme Court stated there were four guidelines for admissibility under that rule: (1) The evidence must have a proper purpose; (2) the evidence must be relevant; (3) the probative value of the evidence must outweigh its potential for unfair prejudice; and (4) the court must instruct the jury to consider the evidence only for the purpose for which it was admitted. *Huddleston v. United States,* 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

In this case each of those criteria has been met. The trial court did not abuse its discretion in admitting the evidence of other crimes committed by, or participated in by, defendant.

V. "*The jury should be instructed as to the consequences of an insanity verdict to avoid speculation and conjecture (Assignment #7).*"

Defendant tendered an instruction (defendant's requested instruction No. 2) which purported to set out, in detail, the procedures which would be followed "in the event of a verdict

of acquittal on grounds of insanity . . . ." The instruction was refused, and defendant assigns that action of the court as error.

The law in this state on the question presented by defendant has been settled since 1979. In *State v. Reeves*, 216 Neb. 206, 218-19, 344 N.W.2d 433, 443 (1984), we held:

> The defendant assigns as error the trial court's refusal to instruct the jury with regard to the consequences of an acquittal by reason of insanity. In *State v. Reitenbaugh*, 204 Neb. 583, 284 N.W.2d 19 (1979), and *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), we held that it was not error for the trial court to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity. Our reason for so holding was that, " 'in the absence of some specific statutory provision, a defendant's disposition is not a matter for the jury's concern.' " *Reitenbaugh, supra* at 585, 284 N.W.2d at 20.

Defendant's contention in this regard is without merit.

VI. "*Diminished capacity instruction should be given to jury if any sufficient evidence of the defense exists (Assignment #8).*"

In his eighth assignment of error, defendant contends that the trial court erred in refusing to give defendant's requested instruction on the question of defendant's "diminished capacity" to form the intent necessary to commit murder in the first degree.

Such an instruction is not required under our law. In *State v. Vosler*, 216 Neb. 461, 467, 345 N.W.2d 806, 810 (1984), this court stated: "This court said therein [in the case of *Starkweather v. State,* 167 Neb. 477, 93 N.W.2d 619 (1958)] that a special diminished capacity instruction need not be given where the jury had otherwise been properly instructed that intent was an element of the crime charged." The trial court did not err in refusing to give defendant's requested instruction as to "diminished capacity."

In the case before us, the court fully instructed the jury on the issues of intent and insanity. Aside from the general instruction on intent, the trial court instructed, in part, as follows:

> You may consider any evidence received concerning the

> defendant's mental condition as it bears on the presence or absence of the intent necessary to prove the crime charged. It is for you to determine from all of the facts and circumstances in evidence whether or not each defendant had the criminal intent or purpose [necessary to find the defendant guilty of first degree murder or murder in the second degree.]

Defendant's eighth assignment is without merit.

VII. "*When the Defendant raises the issue of sanity the state should have the burden of proving beyond a reasonable doubt that the Defendant was sane at the time of the offense (Assignments #9 and #10).*"

Prior to the trial the defendant filed notice of his intention to rely on insanity as a defense pursuant to Neb. Rev. Stat. § 29-2203 (Reissue 1985). This statute provides in pertinent part:

> Any person prosecuted for an offense may plead that he . . . is not responsible by reason of insanity at the time of the offense and in such case the burden shall be upon the defendant to prove the defense of not responsible by reason of insanity by a preponderance of the evidence. . . .
>
> Upon the filing of the notice the court, on motion of the state, may order the defendant to be examined at a time and place designated in the order, by one or more qualified experts, appointed by the court, to inquire into the sanity or insanity of the defendant at the time of the commission of the alleged offense.

The defendant contends that § 29-2203 is unconstitutional in that the statute "violates the Due Process Clause, Equal Protection Clause, and Cruel and Unusual Punishment Clause of the Fourteenth and Eighth Amendments to the United States Constitution and Article I, Sections Three, One and Nine of the Nebraska Constitution . . . ." Brief for appellant at 46. The gist of assignments Nos. 9 and 10 is that § 29-2203 unlawfully shifts the burden to the defendant to prove by a preponderance of evidence that he was not responsible by reason of insanity.

The defendant sought to limit his culpability on the grounds that he was not responsible by reason of insanity. The jury was instructed that the State had the burden of proving that the

defendant was guilty beyond a reasonable doubt of the crime charged against him. Section 29-2203 sets out an affirmative defense to the crime of murder and did not require the defendant to disprove any of the elements of the offense with which he was charged.

Defendant cites *Davis v. United States*, 160 U.S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895), which held that the United States, in federal court actions, had the burden of proving that a criminal defendant was sane at the time of the offense. Defendant does not direct our attention to the fact that in 1952, the U.S. Supreme Court refused to apply the *Davis* rule, which the Court determined to be "only the rule to be followed in federal courts," to proceedings in the State of Oregon. *Leland v. Oregon*, 343 U.S. 790, 797, 72 S. Ct. 1002, 96 L. Ed. 2d 1302 (1952). In the *Leland* case, the defendant pled not guilty to a charge of first degree murder and gave notice of his intention to rely on insanity as a defense under an Oregon statute which required a criminal defendant to prove his insanity beyond a reasonable doubt. The U.S. Supreme Court upheld the Oregon statute, noting that so long as the presumption of innocence was maintained and the State was required to prove all the elements of the crime charged beyond a reasonable doubt, a defendant could be required to plead and prove the defense of insanity, where defendant presents the defense as an absolute bar to the crime charged. The Nebraska statute is more favorable to a defendant, since the burden of proof under the Nebraska statute is by a preponderance of the evidence rather than beyond a reasonable doubt.

In *Patterson v. New York*, 432 U.S. 197, 205, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the Supreme Court reaffirmed the viability of *Leland*, when it stated:

> Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of *Leland v. Oregon*. This occurred in *Rivera v. Delaware*, 429 U.S. 877 (1976), an appeal from a Delaware conviction which, in reliance on *Leland*, had been affirmed by the Delaware

> Supreme Court over the claim that the Delaware statute was unconstitutional because it burdened the defendant with proving his affirmative defense of insanity by a preponderance of the evidence.

See, also, *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987), where the Supreme Court of the United States affirmed a decision of the Ohio Supreme Court holding it was not unconstitutional to place the burden of proving self-defense, in a murder charge, on the defendant. In *State v. Hankins,* 232 Neb. 608, 441 N.W.2d 854 (1989), this court held that § 29-2203 was constitutional. We continue to so hold in this case.

Insofar as defendant contends that § 29-2203 is unconstitutional in view of the provisions of Neb. Const. art. I, §§ 1, 3, and 9, we also determine that § 29-2203 is constitutional.

In *Leland v. Oregon, supra*, and *Patterson v. New York, supra*, the U.S. Supreme Court confirmed that the Oregon and New York statutes, similar to § 29-2203, were constitutional. As stated above, § 29-2203 affords greater protection to a defendant than did Oregon's statute, in that the Nebraska statute places a lesser burden of proof on a defendant. We hold § 29-2203 as constitutional under the Nebraska Constitution.

In the defendant's 10th assignment of error, he contends that § 29-2203 is unconstitutional in that the "shifting of the burden of proof back and forth between the State and the Defendant is so confusing to the jury as to violate the Defendant's Due Process Rights." The defendant fails to cite this court to any authority for this proposition. The contention concerning possible confusion of the jury in determining the distinction between the State's burden of proving premeditation and the other elements of a murder charge and a defendant's burden of proving insanity was also present in the *Leland* case. On that issue, the Court stated:

> We think the charge to the jury was as clear as instructions to juries ordinarily are or reasonably can be, and, with respect to the State's burden of proof upon all the elements of the crime, the charge was particularly emphatic. Juries have for centuries made the basic decisions between guilt

> and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think that to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so.

Leland v. Oregon, 343 U.S. 790, 800, 72 S. Ct. 1002, 96 L. Ed. 2d 1302 (1952). We have reviewed the record and find that the instructions herein fully conform to the standards set out in *Leland*.

Potential jurors were informed during voir dire, and the court's instructions provided, that the State was required to prove beyond a reasonable doubt all the elements of the crime charged. The jury was also instructed that defendant was required to prove by a preponderance of evidence that he was not responsible by reason of insanity.

These two burdens were specifically defined by the court in the general instructions to the jury, and the jury was instructed that the burden of proving all the elements of the crime never shifts from the State. The jury was also instructed as to the presumption of defendant's innocence.

Section 29-2203 is not unconstitutional under the U.S. or Nebraska Constitution, and the instructions in this case did not violate defendant's due process rights. Assignments Nos. 9 and 10 are without merit.

VIII. *"Third parties should not be allowed to circumvent [a] sequestration order (Assignment #11)."*

During the trial, the court ordered that the witnesses be sequestered pursuant to Neb. Rev. Stat. § 27-615 (Reissue 1985). The defendant contends that he was denied due process and his constitutional right to confront the witnesses against him because the State had a psychiatrist present in the courtroom during the trial and that this psychiatrist, Dr. Wingert, advised the prosecution and consulted with Dr. Kenney, a psychiatrist who testified on behalf of the State. The defendant contends that this was a violation of the sequestration order and violated his constitutional rights as set

out above. We do not agree.

After the jury had been excused for lunch on Thursday, April 3, 1986, Dennis Ryan's attorney moved the court for an order to prevent the State's psychiatrist who was testifying at the trial from speaking to the State's psychiatrist who had been present in the courtroom during the trial. The court responded:

> THE COURT: I don't think there was any order of sequestration that said that people couldn't talk to each other outside of the courtroom. There just wasn't such an order entered. If you want to show me one, Mr. Rehm, I will be happy to look at it.
>
> MR. REHM [Dennis Ryan's cocounsel]: Well, I think that it's so — If you have a sequestration order, the idea is that you don't want your witnesses, subsequent witnesses, to get —
>
> THE COURT: Mr. Rehm, you've showed depositions to all of your witnesses. What are you talking about?
>
> MR. REHM: I didn't have a psychiatrist sitting in here that talked to the other psychiatrist to tell him what the other doctor said in professional terms. We didn't do that. We haven't had that.
>
> . . . .
>
> THE COURT: Mr. Rehm, you asked for a daily copy, which you were granted, so you could take the testimony from the courtroom and deliver it to your witnesses so they could read it. Now what are you talking about?
>
> . . . .
>
> MR. REHMEIER [the assistant prosecutor]: Dr. Wingert has been present and Dr. Wingert has conferred with Mr. Merz [the prosecutor] and myself and with Dr. Kenney [the State's psychiatrist]. That was the reason to have him in here. The first day that Dr. Wingert was in here, Mr. Rehm knew it and asked me, "Are you going to call that guy as a rebuttal witness?"
>
> I said, "No. He is in here to assist us on the terminology and what is going on in the courtroom." He knew from the very first day that Dr. Wingert ever walked into this courtroom his purpose.
>
> Now he waits and raises this.

> Number two, there is no violation of the sequestration rule. We're not going to be calling Dr. Wingert as a witness. There's no difference in me talking to my witness or if I have somebody else sitting here listening on my behalf to help me understand what in the heck is going on so that I can intelligently talk to our psychiatrist.

There are several problems in the discussion of this point. Initially, we are not directed by defendant to any part of the record setting out the terms of the sequestration order, nor does our examination disclose a specific order. We will assume that a general court order as to sequestration of witnesses was made by the court based on § 27-615. The record shows that a motion for mistrial was made and overruled, but defendant does not cite that action of the court as error, but instead alleges that violation of the statute violates his constitutional rights.

The sequestration statute, § 27-615 provides:

> At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order on his own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

As far as the record discloses, there has been no evidence that any witness has heard "the testimony of other witnesses." Further, we note that the record appears to indicate that Dr. Wingert may well have been a natural person designated as a representative of a party not a natural party, the State of Nebraska. Counsel for the State told the court that the presence of Dr. Wingert was essential to the presentation of its case. See § 27-615(2) and (3).

Further, it would appear that defendant waived the presence of Dr. Wingert during portions of the trial. Dennis Ryan's counsel was informed by the prosecutor on the first day Dr. Wingert appeared that Dr. Wingert was not to be called as a witness and that he was present to assist the prosecutors "on the terminology and what is going on in the courtroom." No

objection was raised until Dr. Kenney was halfway into his testimony. The objection was too late.

Defendant has not been deprived of any constitutional rights because of the presence of Dr. Wingert at the trial. See *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989). There is no merit in defendant's assignment of error No. 11.

IX. "*To avoid the undue influence of jurors they should be sequestered during trial and deliberations in a capital case (Assignment # 12).*"

The defendant requested that the jury be sequestered throughout the trial and deliberations. The trial court denied the request, but did order the jury sequestered during its deliberations, as required by Neb. Rev. Stat. § 29-2022 (Reissue 1985).

The determination of whether or not a jury should be sequestered during the trial of a criminal case is left to the discretion of the trial court and, absent an abuse of that discretion or evidence of jury tampering or misconduct, that decision will not be reversed on appeal. *State v. Myers*, 205 Neb. 867, 290 N.W.2d 660 (1980). Defendant asks that we overrule *Myers* to the extent that it holds that it is within the trial court's discretion to determine whether the jury should be sequestered during the trial of a capital case.

The defendant does not allege jury misconduct or that he was prejudiced by the trial court's decision not to sequester the jury during the trial. Section 29-2022 provides, in part:

> If the jury are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on the subject of the trial, nor to listen to any conversation on the subject; and it is their duty not to form or express an opinion thereon until the cause is finally submitted to them.

In keeping with the legislative mandate that requires this court to review all cases where the death penalty has been imposed, we have reviewed the record and conclude that the trial court did not abuse its discretion and that the defendant was not prejudiced as a result of the trial court's refusal to sequester the jury during the trial. The rule in *Myers* stands.

Defendant's assignment No. 12 is without merit.

X. "*The state must prove that the Defendant intended to kill the victim (Assignment #13).*"

Defendant's assignment No. 13 sets out that the " 'Aider and Abettor' jury instruction created an impermissible presumption which denied the Defendant his rights under the Due Process Clause and Cruel and Unusual Punishment Clause." Defendant's argument heading and his assignment of error lead to the conclusion that defendant is assigning as error the court's giving of instructions Nos. 11 and 13.

The jury was given two instructions on aiding and abetting. Instruction No. 13 reflected NJI 14.12, and provided:

> To be guilty of the crime charged, it is not necessary that the State prove that defendant Michael W. Ryan himself committed the unlawful act or acts in question.
>
> Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.
>
> If you find from the evidence beyond a reasonable doubt that the unlawful act or acts in question were committed by another person who was:
>
> 1. Engaged by defendant Michael W. Ryan to commit the unlawful act or acts, or
>
> 2. Engaged with defendant Michael W. Ryan in a common, concerted unlawful act or acts, or
>
> 3. Incited or encouraged by defendant Michael W. Ryan to commit the unlawful act or acts,
>
> then defendant Michael W. Ryan is as guilty as if he himself committed the unlawful act or acts, and it is your duty to find defendant Michael W. Ryan guilty.
>
> Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
>
> On the other hand, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving a defendant guilty.

This instruction accurately describes the statutory requirements of Neb. Rev. Stat. § 28-206 (Reissue 1985), which provides: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

The jury also received instruction No. 11, which provided in part:

> Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself or herself had the required intent. If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated him or her.

In addition, the court instructed the jury as to the intent necessary to be found before the defendant could be convicted of the various degrees of homicide.

The defendant contends that the language of instruction No. 11 "had the effect of letting the jury find the Defendant guilty of First Degree Murder without specifically finding that the Defendant intended to kill." Brief for appellant at 51. Defendant is not correct in this assertion. Instruction No. 11 told the jury that an aider and abettor could not be held as a principal unless he knew the perpetrator had the required intent. The jury was also instructed that an "aider's guilt is measured by the intent that actuated him . . . ." The jury was properly instructed on the law of aiding and abetting, and there was more than sufficient evidence before the jury to support a determination of defendant's guilt of first degree murder. Defendant's assignment No. 13 is without merit.

XI. "*Fundamental fairness demanded the testimony of co-defendants be excluded (Assignment #14).*"

In this assignment of error, defendant does not complain of any specific action of the trial court, but states, "By allowing co-defendants to testify who admittedly had continually lied and guessed under oath, the Court decreased the reliability of the trial so as to violate the Defendant's Due Process rights and subjected him to Cruel and Unusual Punishment."

The conduct of the court complained of in this assignment apparently was the trial court's failure to exclude the testimony of "John Andreas, James Haverkamp, Timothy Haverkamp, and Ora Richard Stice." Brief for appellant at 52. The testimony of Stice will not be considered in this regard, since he was not a codefendant, nor was he an accomplice in the actual murder of James Thimm.

With regard to the testimony of the others named, while they were all accomplices in the murder of Thimm, none of those named were actually codefendants during the trial of defendant and Dennis Ryan. The case filed against Timothy Haverkamp was consolidated at one time with defendant's case, but Timothy Haverkamp pled guilty to second degree murder before defendant's trial and appeared in the trial as a witness for the State. Andreas and James Haverkamp pled guilty to other charges before defendant's trial. The testimony of these witnesses will be discussed as the testimony of accomplices.

This court has long held that an accomplice is competent to testify and that the value of such testimony is for the jury. *State v. Sneff*, 22 Neb. 481, 35 N.W. 219 (1887). We have held that a criminal conviction may be based upon the uncorroborated statements of an accomplice. *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986).

The jury was given the following instruction:

> The State has adduced testimony from claimed accomplices. Their testimony should be closely scrutinized for any possible motives for falsification, and if you find that any of them has testified falsely in regard to any material matter, you should be hesitant to convict upon his testimony without corroboration, and in no case should you convict a defendant unless you are satisfied of his guilt from all the evidence beyond a reasonable doubt.

The defendant contends that James Haverkamp "admitted to one lie after another, to guessing instead of telling the truth and to fabricating testimony to protect himself and others." Brief for appellant at 57. Where the jury has been properly instructed that testimony of an accomplice should be scrutinized closely for possible motives of falsification, the

uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction. *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985). In the cause before us, the evidence in the record, including defendant's own testimony, shows that the evidence of defendant's guilt was overwhelming.

The trial court properly instructed the jury, and the evidence was sufficient to support the jury's finding. The testimony of Andreas, James Haverkamp, and Timothy Haverkamp was properly before the jury, and it was for the jury to decide what weight to attach to their testimony. Defendant's assignment of error No. 14 is without merit.

XII. "*There was insufficient evidence for the jury to find beyond a reasonable doubt that the Defendant intended to kill the victim (Assignment #15).*"

Defendant's 15th assignment alleges: "There was insufficient evidence to prove the Defendant guilty of the killing of James Thimm. The jury also erred by not finding the Defendant met his burden on the question of his insanity." With regard to the contention that there was insufficient evidence presented at the trial to warrant his conviction for first degree murder, we have said above that the evidence was overwhelming. The defendant testified at the trial. During this testimony the defendant admitted that he was the leader of the group and admitted that he gave orders to torture Thimm. The events of the torture and death were presented in nauseating detail. The defendant also admitted to having used the arm test through Lisa Haverkamp in order to determine when Thimm was to die. The record also shows that Ryan had Thimm sign the title of his vehicle over to Timothy Haverkamp. All the evidence clearly indicated that the defendant intended to take Thimm's life. Defendant's contention in this regard is frivolous.

The defendant also asks this court to find as a matter of law that he was insane under the provisions of § 29-2203 and lacked the requisite mental state to be able to form the intent necessary to be convicted of first degree murder. The statute explicitly leaves this determination to the jury.

The record demonstrates that there was ample evidence before the jury to support a finding that the defendant was

legally sane at the time of James Thimm's murder. The defendant was examined by Maurice K. Temerlin, Ph.D., a clinical psychologist, who testified on defendant's behalf. Dr. Temerlin testified that in his opinion the defendant was a paranoid schizophrenic. Dr. Temerlin supported his opinion with the following statement:

> My opinion is that [the defendant] was so lost in Wickstrom's teachings and had been so — his mind so distorted by Wickstrom's teachings and by his own individual psychology and the crazy environment in which he lived, that he did not know what he was doing, or did not understand the consequences of it. I think he thought that he was doing what Yahweh wanted him to do, to punish sinners. And to him, given the disorganized, nonrational state that I think his mind was in, he was doing a virtuous deed.

The defendant was also examined by James K. Cole, Ph.D., a clinical psychologist. Dr. Cole testified that there was no evidence that the defendant was suffering from schizophrenia at the time of Thimm's murder. Dr. Cole also testified that there was no evidence that the defendant was suffering from any type of psychosis.

Emmett Kenney, M.D., a psychiatrist, also examined the defendant and testified on behalf of the State. Dr. Kenney testified that there was no evidence that the defendant was suffering from an organic brain syndrome or psychosis and that the defendant was capable of understanding the nature and quality of his acts during the time Thimm was being tortured. Kenney also testified that he did not believe that the defendant suffered from paranoid schizophrenia, that the defendant had a sufficient mental capacity to turn the matter over in his mind, and that the defendant intended the obvious and probable consequences of his actions. Kenney testified that defendant "had sufficient capacity to understand the rightness or the wrongness of his acts" and that "he did know that the acts were wrong and were deserving of punishment." Kenney also testified that the Rulo group was "an eccentric family or . . . an adult criminal gang."

It was on this evidence that the jury concluded that the

defendant was sane. The credibility and weight to be given testimony is a matter for the evaluation and determination of the jury. *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). The defense of insanity when interposed by an accused is a question of fact for the jury. *Philbrick v. State*, 105 Neb. 120, 179 N.W. 398 (1920). The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975); *State v. Klatt*, 187 Neb. 274, 188 N.W.2d 821 (1971); *State v. Newson*, 183 Neb. 750, 164 N.W.2d 211 (1969).

In determining whether the evidence before a jury was sufficient to support the jury's finding, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury, for these are within the jury's province for disposition, and a jury's verdict must be sustained if evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. LynCook*, 227 Neb. 719, 419 N.W.2d 686 (1988); *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988).

The issue of defendant's sanity was fairly presented and decided by the jury, and we will not disturb that decision on appeal. Defendant's assignment of error in this regard is without merit.

XIII. "*Judicial misconduct and failure of the Court to disqualify itself at sentencing denied Defendant a fair and impartial sentencing tribunal (Assignments #16 and #17).*"

Rather than an assignment of error, in his assignment No. 16 defendant has stated what he considers a fact determinative of his statement that he has been denied due process, apparently during the guilt-innocence part of the trial. In his assignment No. 17, defendant straightforwardly sets out that the trial judge erred "in failing to disqualify [himself] at the penalty phase" of the trial and in support of that contention sets out events occurring during the trial. We shall treat assignment No. 16 as if defendant is contending that the trial judge erred in failing to disqualify himself from presiding at the trial. As presented in defendant's brief, the two points are argued together, and we

will so consider them.

This court, long ago, set out the standards as to conduct during a trial to which a trial judge must conform in order to provide a defendant a fair trial. In *Hansen v. State*, 141 Neb. 278, 286-87, 3 N.W.2d 441, 446 (1942), we said:

> "It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury . . . but also on the examination of witnesses and otherwise during the course of the trial. The trial judge should not deny the existence of any fact bearing on the innocence of accused, or make any remark or inquiry in the presence of the jury concerning matters of fact at issue which indicates his opinion as to such facts." . . .
>
> ". . . It is well known to those who are familiar with jury trials that jurors are usually alert to discover the attitude of the court respecting the merits of the case, and particularly in criminal actions. For this reason, among others, the court should avoid even the appearance of partiality as between the parties. . . ."

See, also, *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946); *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985); *State v. Larmond*, 244 N.W.2d 233 (Iowa 1976).

The cases we have cited are concerned primarily with statements made by the trial judge, but it is axiomatic that conduct can speak as loudly as words. The trial judge in this case, by his conduct, has expressed himself to some degree. We must consider whether that conduct has prejudiced defendant's right to a fair trial.

The facts set out by defendant on these issues are the following.

During the sentencing hearing held on September 15, 1986, the defendant's attorney asked the trial judge

> to say something about the meeting in chambers when we were here for sentencing on the second degree murder charge. [The defendant pled nolo contendere on July 28, 1986, to the second degree murder of Luke Stice and was sentenced to life imprisonment for this murder on September 11, 1986.] The meeting in chambers,

apparently, between the court and to some extent, Mr. Merz [the prosecuting attorney], with — with persons interested in the Luke Stice matter.

THE COURT: Okay. Well, for the record and for your information, Mr. Goos and Mr. Ryan, the Court has, after each — at the conclusion of each case, asked the family members of the victims if they would like to visit with the Court, and if so, answer certain questions about legal proceedings that might have gone on during the course of the trial. And a number of the family members did want to visit with the Court and, basically, the subject of that visit was to answer — All right, Mr. Merz, first of all, wasn't there except for — I asked him to explain one thing to them. And, basically, it was just to answer questions about the proceedings that went on pertaining to that case. *There was absolutely no discussion about any other cases other than that case.* . . .

. . . .

. . . The Court didn't have any inquiries it wanted to make of the family. The only thing the Court wanted to do was make itself available to the family to answer any questions about any procedural matters; legally — legal procedural matters that might have been confusing to them, 'cause we're quite frequently getting criticized that —that no one ever shows any consideration of the victims by at least being willing to answer questions. And I asked Mr. Merz to come in and answer a question that they had, and to be right honest with you, I — Do you recall what that was? It had to do with the plea bargain, I believe.

MR. MERZ: Well, Your Honor, the substance of the question was, frankly, what was the legal effect of the no contest or the nolo contendere plea.

THE COURT: Yeah, that's right. So, that question was raised to, you know, what is the legal consequences of a — or, significance or meaning of a no contest plea . . . .

(Emphasis supplied.)

In *State v. Barker*, 227 Neb. 842, 847, 420 N.W.2d 695, 699 (1988), we held: "[A] judge, who initiates or invites and receives an ex parte communication concerning a pending or impending

proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal." See, also, *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989).

Initially, we must determine whether the trial judge violated this rule. It is true that the trial judge stated he had invited an ex parte communication with "the family members of the victims." The law does not condone such a practice. The record does not show, however, that the trial judge met with the James Thimm family, and the judge affirmatively stated, "There was absolutely no discussion about any other cases than that [Luke Stice] case." There is nothing in the record indicating anything to the contrary.

The trial judge did meet with the Luke Stice family before defendant was sentenced on his plea of nolo contendere to the second degree murder of Luke Stice, and so stated in the case before us. In that connection, the trial court acted as a witness within the holding set out in *State v. Barker, supra*. The propriety of the court's actions in the Stice murder case is not before this court in this case. Any communication the judge had with the Stice family cannot be said to have concerned the pending or impending proceeding before the trial court and this court in this case, the murder of James Thimm, in connection with either the sentencing of defendant or the conduct of the trial.

Additionally, the sentencing court did not consider the Luke Stice murder as an aggravating circumstance under Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985). This subsection provides: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity."

We held in *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), and *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), that this circumstance exists where the defendant had killed someone prior to the murder for which he was sentenced to death.

The rule set forth in *Barker, supra*, does not apply to the case at bar, given the fact that the ex parte meeting did not concern a pending case, and the murder of Luke Stice was not considered.

under circumstance (1)(a) by the judge in sentencing the defendant.

In his 17th assignment of error the defendant contends that he was prejudiced before the jury when the trial judge turned his back to the defendant "during at least half of [the defendant's] testimony." Brief for appellant at 59. During a hearing on a motion for a new trial the trial judge stated to defendant's attorney:

> Let me get your advice for the next trial, would you rather that when testimony's coming in about a shovel handle going up somebody's rectum and it just, you know, kind of smarts a little bit, would you rather I do that facing the jury, or would you rather I do that with my back to the jury?

The trial judge apparently has admitted the conduct alleged by defendant on this point. The fact that the trial judge turned away from the defendant in an attempt to hide his expressions from the jury while the defendant described, in detail, the atrocities of his crime was inappropriate, but does not constitute prejudicial error in this case. There are cases when such conduct by a judge might constitute prejudicial error in a criminal trial, but in this case, where the evidence of defendant's guilt is so overwhelming, we hold that the trial judge's actions did not constitute reversible error. It would have been better had the judge observed all witnesses while they testified about the sickening events, as the jury was required to do, but the judge's conduct does not constitute prejudicial error in this case.

If it be considered that defendant is attacking the judge's conduct as affecting the guilt-innocence portion of the trial, there are separate reasons why that conduct does not require reversal of this cause on that issue.

With regard to the Luke Stice matter, any communications with the Stice family occurred after the case had been submitted to the jury and the jury had determined defendant guilty of first degree murder. The activities in this regard could not have affected the jury verdict in any way.

With regard to the judge's actions during defendant's testimony, we cannot find in the record, nor are we directed to any portion of the record, where defendant objected to the

judge's actions. The incident was not mentioned until defendant filed a motion for new trial after the verdict. It is not possible for this court to now judge the effect of the judge's turning his back on defendant while he was testifying, but defendant may not let that occur and then, after the verdict, complain of the conduct. We are not faced with the situation in *State v. Larmond*, 244 N.W.2d 233 (Iowa 1976), where the Iowa court was faced with the further problem that defendant's counsel was inexperienced. Defendant's counsel in this case was experienced and, as the record shows, was not at all reticent in representing defendant.

Insofar as defendant contends the trial judge's activities affected the sentencing procedure, that issue will be discussed later in this opinion.

Defendant's 16th and 17th assignments of error are without merit.

XIV. "*It is error for the sentencing judge not to convene a three-judge panel when requested by the Defendant (Assignments #18, #19, & #20).*"

The defendant contends that § 29-2520 is unconstitutional, since it grants the trial judge discretion in determining whether a three-judge sentencing panel will preside over the sentencing of a defendant charged with a capital crime. We have held that the sentencing procedure provided by § 29-2520 does not violate either the Nebraska or federal Constitution. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977).

As we noted in *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), the State of Florida has a statute similar to § 29-2520. This statute, Fla. Stat. Ann. § 921.141 (West 1985), provides:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment . . . . The proceeding shall be conducted by the trial judge before the trial jury . . . .
>
> . . . After hearing all of the evidence, the jury shall deliberate and render an advisory sentence to the court . . . .

> . . . Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . . .

This statute was challenged on constitutional grounds in *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 960, 49 L. Ed. 2d 913 (1976). We quoted from *Proffitt* in *State v. Simants, supra* at 558, 250 N.W.2d at 887:

> "[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

The Nebraska statute, § 29-2520, provides for the sentencing determination to be made by:

> (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

This statute does grant the trial judge discretion in that he or she may opt to conduct the sentencing with or without the assistance of two additional judges. However, this discretion cannot be said to be constitutionally infirm where the U.S. Supreme Court has held that a single judge presiding at a defendant's trial may conduct and decide the sentencing phase of a capital case. *Hildwin v. Florida*, ____ U.S. ____, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989); *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

The U.S. Supreme Court has refused to select a single best method for a state to conduct capital sentencing. *Spaziano,*

supra. See, also, *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 871 (1984); *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

There are currently 37 states with death penalty statutes. Twenty-nine of these states have statutes that allow a death sentence only after a jury recommends such a sentence. Three of these states allow a judge to override the jury's recommendation. Ala. Code § 13A-5-46 (1982); Fla. Stat. Ann. § 921.141 (West 1985 & Supp. 1989); Ind. Code § 35-50-2-9 (Supp. 1988). Nevada requires a three-judge panel to impose sentence only if the jury cannot agree. Nev. Rev. Stat. §§ 175.554 and 175.556 (1987). Of the remaining four states, of which Nebraska is one, the sentencing determination in a capital case is made by a judge without a jury. Ariz. Rev. Stat. Ann. § 13-703 (Supp. 1988); Idaho Code § 19-2515 (1987); Mont. Code. Ann. § 46-18-301 (1987); Neb. Rev. Stat. § 29-2520 (Reissue 1985). After reviewing these statutes and the cases interpreting them, we are convinced that the Nebraska Legislature has provided a sentencing method that is fair and sensitive to a capital defendant and satisfies the requirements of the U.S. and Nebraska Constitutions. The Nebraska statute ensures the death penalty will not be imposed arbitrarily or discriminatorily.

Defendant argues that where a defendant has requested a three-judge sentencing panel, such a panel should be mandatory. We disagree. The statute clearly places the discretion with the trial judge, and this grant of discretion is neither unreasonable nor constitutionally infirm.

Pursuant to Neb. Rev. Stat. § 29-2521.03 (Reissue 1985), this court is charged with a review to determine the propriety of the death sentence in a case in which it has been imposed by comparing the sentence with previous cases involving the same or similar circumstances. *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). We have compared this case with previous cases in which the death penalty has been imposed under § 29-2520. We do not find any evidence in the record indicating the defendant was prejudiced by the trial judge's refusal to request the designation of a three-judge sentencing panel.

The determination of whether to request the designation of a three-judge sentencing panel under § 29-2520 is left to the discretion of the district court, and absent a showing of an abuse of that discretion, this court, on appeal, will affirm that decision. Defendant's 18th, 19th, and 20th assignments of error are without merit.

XV. "*Defendant's sentence was unconstitutionally imposed because he was denied a jury trial on the facts that comprise the ingredients of his offense (Assignment #21).*"

The defendant argues that Neb. Rev. Stat. § 29-2522 (Reissue 1985) is unconstitutional in that it denies a criminal defendant the right to have a jury determine the factual issues comprising the condemned criminal act. This contention has been determined adversely to defendant's position.

The U.S. Supreme Court held in *Hildwin v. Florida, supra* at 109 S. Ct. at 2057:

> [T]he requirement that the [capital sentencing] findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." [Quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).] Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty." *Id.*, at 86, 106 S.Ct., at 2417. Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). Assignment No. 21 is without merit.

XVI. "*Without an affirmative showing on the record that Miranda type warnings have been given to the Defendant prior to an examination by the state's psychiatrist the psychiatrist should be precluded from testifying at the penalty hearing (Assignments #22 and #23).*"

In his assignment No. 22, defendant states that "[b]y the introduction of the State's psychiatrist's testimony at the

sentencing stage without the State giving the Defendant *Miranda* type warnings prior to the psychiatrist's interview of the Defendant, the Defendant's constitutional protection against self-incrimination were [sic] violated."

On this point, defendant sets out no specific action of the trial court which he challenges in this regard. Apparently, defendant is assigning as error the failure of the trial court to sustain his objection to the use of the trial testimony of the State's psychiatrist, Dr. Kenney, at the sentencing.

Assignment No. 23 is another general statement that defendant was denied due process and effective counsel because he did not receive "advanced notice of the intended use of the psychiatric exam by the State"—apparently at the penalty phase of the trial. Again, there is no assignment of error in any specific action of the trial court, but we assume the error complained of is the court's consideration of Dr. Kenney's trial testimony during the penalty phase, when defendant had not been given *Miranda* warnings prior to a psychiatric examination which had been ordered after the defendant gave notice of his intention to rely on an insanity defense.

Defendant cites this court to *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), wherein the court ordered a psychiatric examination of defendant. Smith was examined by a court-appointed psychiatrist pursuant to a court order, which the trial judge had entered sua sponte, to determine the issue of Smith's competency to stand trial. After the trial, Smith was found guilty of murder by a jury. At a separate sentencing hearing after Smith had been found guilty by the jury, this same psychiatrist, who was not listed as a witness, testified on behalf of the State, over Smith's objections, on the question of defendant's future dangerousness. The Supreme Court summed up the case when it stated: "The state trial judge, *sua sponte*, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent." 451 U.S. at 465. On these facts, the U.S. Supreme Court held: "A criminal defendant, who neither initiates a psychiatric evaluation nor

attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." 451 U.S. at 468.

This ruling is not applicable to cases where a defendant has put his sanity into issue. In this case, defendant put at issue his sanity, as a defense to the charge of first degree murder. He apparently contends that the question of defendant's insanity must be decided twice—at the trial of the guilt or innocence of defendant and at the penalty hearing—and that evidence at the trial should not be considered at the penalty phase.

At the jury trial on the issue of defendant's innocence or guilt, a psychiatrist testified on defendant's behalf.

At the penalty phase of the trial, the same psychiatrist testified that at the time of the murder of James Thimm, defendant was acting under "unusual influences." In answer to the question "do you feel that he was under the influence of any extreme mental or emotional disturbance," this witness answered: "[I]f that phrase includes what we would term being actively psychotic or being delusional with regards to the events that were going on at the time, the answer would be yes." This witness also testified, in answer to the question, "What about his capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law?" as follows:

> A Well, certainly he, personally, did not view what happened to James Thimm as wrong, but as something commanded by God and as something he was obligated to obey. In terms of his ability to control his behavior, to the extent that his behavior is — is guided by a persons thought process, and his, regarding that issue, was — was clearly delusional. His behavior was not under the influence of any kind of cognitive control.

These answers were obviously a part of defendant's evidence to show that mitigating circumstances (b), (c), and (g) of § 29-2523(2) were proved by defendant by the evidence before the court on the penalty phase. These answers were based on the examination the witness had made of the defendant in connection with the insanity defense filed on behalf of the defendant. After the psychiatrist had testified at the penalty

phase, the defendant testified on his own behalf.

At the conclusion of the defendant's testimony, Emmett Kenney, M.D., a psychiatrist, testified in rebuttal for the State. During the guilt-innocence phase Dr. Kenney testified that he had examined the defendant at his office in Omaha under the following circumstances:

> I introduced myself, explained my particular role, explained that it was not a standard psychiatric interview in that it was not confidential, explained that the other way in which it was not customary was that there was a tape-recorder present on the desk. I asked him to speak loudly . . . and explained that the tape-recording was there at the request of his attorney.

It is obvious from this uncontroverted testimony that the defendant was advised that anything he told Dr. Kenney would not be kept confidential and that defendant's counsel was fully aware of the psychiatric interview in that the examination was being recorded for the defendant's attorney. The rule set forth in *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), does not apply under these circumstances.

In *Buchanan v. Kentucky*, 483 U.S. 402, 404, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), one of the questions determined by the Supreme Court was

> whether the admission of findings from a psychiatric examination of petitioner proffered solely to rebut other psychological evidence presented by petitioner violated his Fifth and Sixth Amendment rights where his counsel had requested the examination and where petitioner attempted to establish at trial a mental-status defense.

In the case before us, defendant and his counsel had, in effect, requested or authorized a psychiatric examination by a State's expert when the defense of insanity was raised under § 29-2203. Further, defendant was attempting to establish at trial, and at the sentencing hearing, a "mental-status defense."

The Supreme Court has held that, in such circumstances,

> [s]uch consultation, to be effective, must be based on counsel's being informed about the scope and nature of the proceeding. There is no question that petitioner's counsel had this information. To be sure, the effectiveness

> of the consultation also would depend on counsel's awareness of the possible uses to which petitioner's statements in the proceeding could be put. Given our decision in *Smith*, however, counsel was certainly on notice that if, as appears to be the case, he intended to put on a "mental status" defense for petitioner, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal.

483 U.S. at 424-25.

In this case, defendant's challenge to the testimony of Dr. Kenney at the sentencing hearing is without merit. Defendant's contention that Dr. Kenney's trial testimony should not have been considered at the penalty phase is discussed in the following argument. Defendant's assignments of error Nos. 22 and 23 are without merit.

XVII. "*Introduction of entire trial record by the state at the sentencing phase was error (Assignments #24, #25, #26, #27, #28, and #29.*"

Defendant has summarized his assignments of error Nos. 24 through 29 in the heading to his argument XVII. We shall assume that in those assignments of error, defendant is assigning an error which may be summarized as alleging that the trial court erred in receiving the evidence at the trial in the sentencing portion of the trial because, by such action, defendant was denied his right to confront the witnesses against him.

We first note that a motion by the prosecutor that the court take judicial notice "of the trial record in these proceedings" and the court's oral finding that he would take such judicial notice are inappropriate. An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2) (Reissue 1985). Nonetheless, for reasons set out below the trial court was entitled to consider the evidence adduced at trial during the sentencing phase.

In its sentencing order, the court did make factual findings based on evidence received during the guilt-innocence phase of the trial. It is clear that the court did not err in the respects claimed by defendant and, indeed, that the assignments in this regard are frivolous. First of all, Neb. Rev. Stat. § 29-2521

(Reissue 1985) provides in part:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received.

Also, § 29-2522(3) provides in part:

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

This section clearly allows the sentencing body to consider evidence adduced at trial to support findings of aggravating and mitigating circumstances.

Further, in *State v. Anderson and Hochstein*, 207 Neb. 51, 72, 296 N.W.2d 440, 453 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 219 (1981), we said:

> We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate.

As can be seen, this court implicitly held that a trial court can, at a minimum, consider evidence adduced at the trial at the sentencing phase of a capital case. See, also, *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984). Defendant's assignments Nos. 25 through 29 are without merit.

XVIII. "*Deposition of a Co-defendant should not be introduced at sentencing hearing even if Co-defendant refuses to testify (Assignments #30, #31, and #32).*"

Defendant assigns as error the sentencing judge's action in permitting into evidence the deposition of Timothy Haverkamp at the defendant's sentencing hearing after Timothy

Haverkamp refused to testify at the hearing. Among other allegations, defendant contends he was denied his right of confrontation. This contention is frivolous.

The trial court did not commit reversible error in allowing the deposition of Timothy Haverkamp in evidence at the sentencing phase of the trial. The testimony Timothy Haverkamp gave at trial was substantially the same as, if not identical to, the testimony contained in his deposition.

The admission of this deposition was merely cumulative, since the trial court record was already before the sentencing court as disclosed above. At the trial, Timothy Haverkamp was cross-examined extensively by the defendant's attorney. Timothy Haverkamp's testimony on direct examination at the trial encompasses 87 pages of the record, and there are 99 additional pages of cross-examination.

Defendant was not prejudiced by the trial court's admission of Timothy Haverkamp's deposition during the sentencing phase.

XIX. "*Defendant is entitled to receive advanced notice of aggravating facts on which the state will rely at sentencing (Assignment #33).*"

Prior to the sentencing phase the defendant filed a motion requesting that the State provide the defendant with the evidence it intended to utilize during the sentencing hearing. This motion was sustained by the court. The defendant argues that since the record does not affirmatively show that this information was provided to the defendant, he was denied his constitutional right to be "informed of the nature and cause of the accusation against him . . . ." Brief for appellant at 75-76. We disagree. Without some affirmative showing in the record that a grant of a motion for discovery was violated, this court will presume compliance. No such violation was ever directed to the attention of the trial court. We need not discuss the matter further. Defendant's assignment of error No. 33 is without merit.

XX. "*The Court must find the facts upon which an aggravating circumstance relies beyond a reasonable doubt (Assignments #34 and #35).*"

In these two assignments defendant again makes general

statements without specifying what action of the trial court constituted error. We, of course, agree that the facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

As we understand the thrust of defendant's assignment of error No. 34, defendant contends that in considering the applicability of § 29-2523(1)(d), the court made a finding in subsection (i) of paragraph 4 of its sentencing that "[t]here is also some evidence that Michael W. Ryan either removed or amputated James Thimm's penis and testicles or directed that this be done by others" and that this finding, by its own terms, has found this fact by less than the standard of "beyond a reasonable doubt."

We fully agree with defendant's statement that this finding, if it was a finding, was not supported by sufficient evidence and should not have been made. The trial court itself did note, however, that there was only "some evidence," and apparently did not consider this factor in its ultimate determination.

We cannot agree with defendant's conclusion, however, that "[i]f the Court on this one identifiable instance found facts by the wrong standards, it must be assumed that the Court was using the wrong standard on all or a part of the other findings of fact throughout the Order." Brief for appellant at 76. Such a leap in logic is not required as a matter of law by this court. The particular statement of fact referred to above is not supported by the evidence; the trial court so stated; and we have so stated. The reference to possible penis amputation was made by the State's pathologist in his testimony concerning the autopsy, but that same pathologist, in other testimony, argues that the disfiguration is probably the result of decomposition.

That does not control the outcome of this particular assignment of error. The ultimate finding made in connection with this particular challenged finding was that "[t]he court concludes and finds beyond a reasonable doubt this aggravating circumstance [the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. § 29-2523(1)(d)] exists in this case."

In support of that finding, the court lists 10 other specific acts which the court found had been proved beyond a reasonable doubt. Among those specific findings were:

> a) The death of James Thimm occurred over several days while James Thimm was tied and chained in a hog confinement shed;
>
> b) Michael W. Ryan on numerous occasions sodomized James Thimm with a shovel handle and directed others to do the same;
>
> . . . .
>
> e) Michael W. Ryan skinned James Thimm while he was alive . . . .

Our examination of the record shows that all of the other specific facts related by the trial court were established by evidence beyond a reasonable doubt. Defendant does not specifically challenge any of the other findings on this issue. The findings of the trial court in this regard do not constitute prejudicial error to defendant.

In his 35th assignment of error defendant contends that "[b]y the Court inventing its own aggravating circumstances," defendant has been deprived of various constitutional rights. Defendant's brief seems to contend that ordering other people, subject to defendant's full control as in this case, to do evil acts is somehow different from defendant's performing the evil acts himself. That cannot be.

Defendant's assignments Nos. 34 and 35 are without merit.

XXI. "*Double counting of the facts supporting aggravating circumstances is impermissible (Assignment #36).*"

Defendant also contends that the sentencing court counted certain factors twice in determining aggravating circumstances found in § 29-2523(1)(a) and (d). We held in *State v. Rust, supra* at 538, 250 N.W.2d at 874:

> We think it is not reasonable to construe the definitions [of the aggravating circumstances in § 29-2523] in such a manner as to make them overlap and make the same identical facts constitute two aggravating circumstances.
>
> We believe the Legislature intended by each definition to convey a different concept, at least to the extent that some added different and important element . . . is

> included in each separate definition even though some fact or facts in a particular case may pertain to more than one of the definitions . . . .

This standard was complied with by the sentencing court. In his brief, the defendant contends the following facts were used to support a finding of both aggravating factors (1)(a) and (1)(d). In support of (1)(a) the court noted that the "defendant assaulted both Richard Stice and James Thimm leading up to, and prior to the time of, the events involving the death of James Thimm." In support of (1)(d) the sentencing court noted that the defendant "caused James Thimm to suffer further humiliation by directing him to perform homosexual acts with another member of the group." There is evidence in the record to support both of these statements. The record shows that the defendant struck and beat both Stice and Thimm. There was also evidence that the defendant forced James Thimm to engage in homosexual activity. These incidents were distinct and involved different testimony. The ruling in *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), prevents a sentencing court from using the same evidence to support different aggravating factors. It does not prevent a sentencing court from considering evidence of distinct incidents to support different aggravating factors. Defendant's assignment No. 36 is without merit.

XXII. *"Circumstance 1(a) is vague and overbroad and thus unconstitutional (Assignments #37 and #38)."*

Section 29-2523(1)(a) provides as follows: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity."

We have narrowed our interpretation of this statute as this court has been required to review its application. In *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), we held that aggravating circumstance (1)(a) did not exist where the defendant has no prior criminal record. We stated in *Stewart* that "(1)(a) should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose." *Id.* at 520, 250 N.W.2d at 863.

In *State v. Rust, supra,* we determined that aggravating circumstances (1)(a) applied where the defendant had a prior conviction for assault with intent to inflict great bodily harm, and we stated: "We interpret *'substantial history* of serious assaultive or terrorizing criminal activity' to refer to events and incidents prior to and not part of the events out of which the current charge arises. The use of the term 'history' clearly implies earlier events." (Emphasis in original.) *Id.* at 535, 250 N.W.2d at 872-73.

In *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), we found the existence of circumstance (1)(a) where the defendant had convictions for armed robbery and first-degree assault and three convictions for bank robbery. We stated in *Holtan*:

> The words "serious," "assaultive," and "terrorizing" are words in common usage with meanings well-fixed and generally clearly understood. The term "substantial history" is likewise reasonably clear. "History" refers to the individual's past acts preceding the incident for which he is on trial and "substantial," as here used, refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence.

Id. at 546, 250 N.W.2d at 879.

In *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), we upheld a finding of aggravating circumstance (1)(a) where the defendant had the following record: (1) felony escape involving forcible detainer and robbery of a jailer, (2) armed robbery of a service station, (3) burglary of a home, (4) auto theft, (5) three armed robberies in the State of Ohio, (6) armed robbery and rape of a 7½-month pregnant woman in her home, and (7) assault of a librarian in an attempted escape.

In *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), defendant was charged with two murders of cabdrivers occurring 4 days apart. We upheld the sentencing panel's finding of (1)(a) with regard to the second murder and held that a substantial history of serious assaultive or criminal activity included the first premeditated murder. We also stated that the aggravating circumstances in § 29-2523 were to be given a

narrow construction and application.

In *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982), we refused to apply (1)(a) where the facts supporting the circumstance had been shown through the defendant's immunized testimony concerning an Iowa murder.

In *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), on appeal to this court for postconviction relief, we affirmed our finding of circumstance (1)(a). See *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

In *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), we held that any serious assaultive or terrorizing criminal activity committed by the accused prior to the time of the offense charged may properly be considered in order to determine the applicability of aggravating circumstance (1)(a).

In *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987), the defendant had been convicted of two charges of assault and of an attempted second degree assault prior to his first degree murder conviction. We narrowed our interpretation of (1)(a) further in *Bird Head*:

> The State elected not to adduce any evidence concerning the factual circumstances surrounding the assaults in question. We agree with the sentencing panel's conclusion that there are two aspects to aggravating circumstance (1)(a), one of which may be proved by establishing prior convictions for "another murder or crime involving the use or threat of violence to the person" and the other of which may be proved by showing that the offender "has a substantial history of serious assaultive or terrorizing criminal activity," irrespective of whether the offender was convicted for the conduct creating the history.

Id. at 836, 408 N.W.2d at 319.

We must first determine whether the sentencing court correctly applied our interpretation of aggravating circumstance (1)(a).

As noted before, the sentencing judge did not consider the Luke Stice murder in applying this circumstance. The sentencing judge did, however, consider certain other factors which he considered demonstrative of the defendant's history

of "assaultive or terrorizing criminal activity."

In the sentencing judge's written order he stated:

> The evidence submitted to the sentencing court establishes that the defendant did not have, prior to the death of James Thimm, a prior conviction of another murder or a crime involving the use or threat of violence to the person.
>
> However, the facts surrounding the death of Luke Stice actually predated the death of James Thimm by approximately one month. Although, the first clause of this aggravating circumstance is not applicable, the Court feels that the second clause of the aggravating circumstance is applicable. The Court finds from the evidence that the following facts, which facts are not all inclusive, support the finding beyond a reasonable doubt that Michael W. Ryan had a substantial history of serious assaultive or terrorizing criminal activity:
>
> a) Michael W. Ryan either spanked and beat Luke Stice, or directed others to do this;
>
> b) Michael W. Ryan either administered cold showers to Luke and held him under cold water or directed that this be done to Luke;
>
> c) Michael W. Ryan directed others to sexually abuse Luke Stice;
>
> d) Michael W. Ryan used Luke Stice as an ashtray;
>
> e) Michael W. Ryan rolled Luke around in the snow without any clothes on or directed others to do this to Luke;
>
> f) Michael W. Ryan spit in the mouth of Luke Stice;
>
> g) Michael W. Ryan shot chickens in the presence of Luke Stice to create in him a fear of guns or directed that this be done to Luke;
>
> h) Michael W. Ryan terrorized Luke Stice by placing a gun in his mouth and also by shooting him in the arm;
>
> i) Michael W. Ryan either shoved Luke against the wall on three different occasions or directed others to shove Luke against the wall, which acts ultimately resulted in the death of Luke Stice;
>
> j) Michael W. Ryan either held Luke off the ground

with a belt around his neck or directed others to do this to Luke;

k) Michael W. Ryan either shot cigarettes himself from Luke's mouth or directed others to do this; and

l) Michael W. Ryan told Luke that he would be castrated, and that he would be placed on a brush pile and burned alive by him.

The evidence further shows that the defendant assaulted both Richard Stice and James Thimm leading up to, and prior to the time of, the events involving the death of James Thimm. These acts would further support the finding that the defendant had a substantial history of serious assaultive or terrorizing criminal acts prior to the death of James Thimm.

Other facts taken from the evidence which would support finding that the defendant had a substantial history of serious assaultive or terrorizing criminal activity are the following:

a) Shortly before Michael W. Ryan left high school, he assaulted a teacher;

b) According to Michael W. Ryan's own testimony, he assaulted a principal at his high school;

c) According to Michael W. Ryan's accounting to Dr. Logan, he was discharged from the military as a result of fighting with six [military police officers].

We note first of all that the defendant's murder of Luke Stice could have been considered by the court in light of our decisions in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). However, it might have been error for the court to have considered this murder as an aggravating circumstance after having met with members of the Stice family prior to the defendant's sentencing on the James Thimm murder. In this case, the trial court did not consider defendant's plea of nolo contendere and sentence in connection with the murder of Luke Stice as a prior conviction of second degree murder. The court, however, did consider the admitted murder of Luke Stice as evidence of a previous "substantial history of serious assaultive or terrorizing criminal activity."

We feel that the evidentiary facts cited by the sentencing judge rise to the level of "serious assaultive or terrorizing criminal activity," considering that that conduct eventually resulted in the death of Luke Stice. There is sufficient evidence, some of it from defendant, that these events took place, and they are supported beyond a reasonable doubt by the record. We are satisfied that aggravating circumstance (1)(a) was established beyond a reasonable doubt in that the defendant's conduct in causing Luke Stice to be sexually abused, shooting Luke Stice in the arm, hanging Luke Stice by the neck with a belt, shoving Luke Stice against a wall, and shooting cigarettes out of Luke Stice's mouth together all show a "substantial history of serious assaultive or terrorizing criminal activity." Aggravating circumstance (1)(a) was also shown by the defendant's chainings and beatings of both Rick Stice and James Thimm. The record clearly supports a finding of circumstance (1)(a).

We must now determine whether this court's narrow interpretation and application of § 29-2523(1)(a) is unconstitutionally vague or overbroad under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Under the rationale of *Furman*, statutory aggravating circumstances must be clearly defined and applied by a court so as to prevent a sentencing body from exercising discretion that may lead to arbitrary or inconsistent results. The standard laid down in *Furman* is met by our interpretation and application of (1)(a).

Defendant's assignments Nos. 37 and 38 are without merit.

XXIII. "*Circumstance 1(d) is vague and overbroad and thus unconstitutional (Assignments #39 and #40).*"

Section 29-2523(1)(d) is an aggravating circumstance and provides as follows: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

In *State v. Rust*, 197 Neb. 528, 538, 250 N.W.2d 867, 874 (1977), we adopted the following statement made by the sentencing panel:

> "We recognize that all first degree murder crimes are capable of being accurately characterized by one or more

> of the descriptive adjectives employed [in § 29-2523(1)(d)], but by the use of the words 'especially' and 'exceptional' the legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering. . . ."

Defendant argues that § 29-2523(1)(d) is unconstitutionally vague and overbroad. We have held in *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), that § 29-2523(1)(d) is not unconstitutionally vague. We note that the defendant tortured and sexually abused James Thimm and thus imposed extreme suffering on him. Section 29-2523(1)(d) was properly applied by the sentencing judge.

In *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982), we held:

> Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists. . . . The second circumstance pertains to the state of mind of the actor. In *State v. Stewart*, [197 Neb. 497, 250 N.W.2d 849 (1977)], we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in *State v. Holton*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court).

In *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), we held that

> "exceptional depravity" [as used in § 29-2523(1)(d)] exists when the act is totally and senselessly bereft of any regard

> for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."

(Syllabus of the court.)

In *State v. Hunt*, 220 Neb. 707, 725, 371 N.W.2d 708, 721 (1985), we stated:

> [F]orcing items into the victim's throat and the strangulation itself were cruel, but not "especially so," for any forcible killing entails some violence toward the victim. There is no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.

In order for aggravating circumstance (1)(d) to be present, the method of killing must entail something more than the ordinary circumstances which attend any death-dealing violence.

Thus it can be seen that this court has adopted a limiting construction on aggravating circumstance (1)(d), as shown in cases extending from 1977 to 1986. We have held that "especially heinous, atrocious, or cruel" is limited to cases where "torture, sadism, or the imposition of extreme suffering exists," *State v. Moore, supra* at 470, 316 N.W.2d at 41, or where the murder was preceded by acts "performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time," *State v. Hunt, supra* at 725, 371 N.W.2d at 721.

Similarly we have sharply limited the circumstance of "exceptional depravity" sufficient to constitute an aggravating circumstance to circumstances showing relishing of the murder by the killer, infliction of gratuitous violence on the victim, needless mutilation of the victim, senselessness of the crime, or helplessness of the victim. *State v. Joubert, supra.*

In this case, the sentencing court relied on both parts of § 29-2523(1)(d). The court found facts that showed torture,

sadism, and the inflicting of extreme suffering and the fact that the pain existed for a prolonged period of time. The court also found facts showing that defendant relished the murder, that defendant inflicted gratuitous violence on the victim, that defendant needlessly mutilated the victim, and that the victim was helpless.

The findings of the trial court fit squarely with the statutory definition of § 29-2523(1)(d), as that subsection has been limited by this court's decisions.

The U.S. Supreme Court affirmed the U.S. Court of Appeals for the 10th Circuit in *Maynard v. Cartwright,* 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), holding that "heinous," "atrocious," and "cruel," as used in the Oklahoma murder sentencing statute, were "unconstitutionally vague" under the eighth amendment to the U.S. Constitution.

The court noted, in making that ruling, that the Oklahoma courts had not adopted a limiting construction that cured the infirmity in the Oklahoma statute. See, also, *Lindsey v. Thigpen*, 875 F.2d 1509 (11th Cir. 1989) (The "heinous, atrocious or cruel" aggravating factor in Alabama's death penalty statute had been narrowed to those homicides that are unnecessarily torturous to the victim for purposes of determining whether imposition of the death penalty was unconstitutionally "wanton" or "freakish").

We hold that Nebraska has adopted such a limiting construction as to render the Nebraska statute sound and in full compliance with the U.S. Constitution.

We note also that the trial court, in its order of sentence, set out a list of the Nebraska Supreme Court cases it relied on in entering its order and that some of our cases referred to above are on that list.

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the U.S. Supreme Court held that the death penalty may only be imposed under sentencing procedures that do not create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. In *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Court held: "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of

whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

We agree with the court below that the evidence supported a finding of the existence of the "exceptional depravity" circumstance of (1)(d) in that the defendant apparently relished the murder, inflicted gratuitous violence on the victim, and needlessly mutilated the victim. The defendant had the victim tied and chained, and then repeatedly sodomized the victim with a shovel handle thrust some 2 feet into his body, rupturing his colon and damaging his liver. He also whipped, beat, shot, and skinned him, and then assisted in breaking the victim's legs. The defendant also directed others to inflict extreme suffering on the victim. This evidence alone is sufficient to find the existence of circumstance (1)(d). Section 29-2523(1)(d), as applied, meets the standards set forth by the U.S. Supreme Court and this court.

The balancing of aggravating and mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). Additionally, this court's automatic review of capital cases does not require it to set aside a death penalty where certain aggravating factors found to exist below are determined here to be unsupported by the evidence. See Neb. Rev. Stat. § 29-2528 (Reissue 1985). A finding of a single aggravating circumstance on appeal may be sufficient to support a death sentence.

The sentencing court correctly found that sufficient evidence existed to support a finding that both prongs of circumstance (1)(d) existed beyond a reasonable doubt.

Defendant's assignments Nos. 39 and 40 are without merit.

XXIV. "*The state should have the burden at sentencing to prove mitigating circumstances do not exist (Assignment #41).*"

Aside from the fact that the defendant would have the State prove a negative—always a difficult chore—defendant misses the point when he states, "The United States Supreme Court has continually stated that it is impermissible to shift the burden of proof on elements of the crime to the Defendant." Brief for appellant at 88.

We agree with that statement, but suffice it to say that the presence or absence of mitigating factors is not, in any way, an element of the crime of murder. (See the discussion under argument VII above, concerning the burden of proof on the insanity issue.)

Defendant's assignment No. 41 is frivolous.

XXV. "*Refusal of trial court to specifically deal with non-statutory mitigating circumstances (Assignments #42, #43, #44, #45, and #46).*"

The gist of these assignments of error is that the court erred in "failing to deal specifically with the mitigating factors numbered 5 through 16 of defendant's 'Requested Mitigating Factors' . . . ."

We held in *State v. Joubert, supra*, that a defendant may offer any evidence on the issue of mitigation. Prior to the sentencing hearing in this case, defendant requested that the court consider the following "mitigating factors":

> 5. For 34 years of his life [the defendant] was a law abiding citizen, committed no anti-social acts, and no crimes.
>
> 6. It was only after exposure to Jim Wickstrom [sic] teachings that [the defendant's] life changed and anti-social acts were committed.
>
> 7. [The defendant] was a very good father and loved by children.
>
> 8. [The defendant] had a normal childhood (with exception of beatings by his mother), was well-behaved, attended church, fished and hunted with his father.
>
> 9. The disparity of treatment of co-defendants, who did everything defendant did in the matter of the death of James Thimm, compels a life term of imprisonment.
>
> 10. Defendant offered to plead guilty to the offenses of second degree murder and kidnapping with harm to the victim (life imprisonment with no minimum term), so that he could have received two life sentences on such pleas; and in addition he offered to plead no contest to a charge of manslaughter insofar as the death of Luke Stice was concerned, all of which could have led to terms of imprisonment of life consecutiive [sic] to life consecutive

to 20 years imprisonment. But such offers of pleas to the county attorney were rejected.

11. Defendant is already serving sentence of life imprisonment and no legitimate interest of the State will be served by imposing the sentence of death.

12. Letter from the Director of Nebraskans Against the Death Penalty.

13. Letter from juror Short.

14. The court extended mercy to co-defendant Tim Haverkamp when it allowed the State to amend its charges to second degree murder, thus making him a witness—although not a truthful one—against defendant, and the Court can extend and should extend mercy to this defendant.

15. Defendant cooperated with the authorities by assisting in the identification of the stolen property on the Rulo farm—most of it stolen by Co-defendants.

16. Dave Andreas does not want defendant to be executed.

The sentencing court considered these factors, as may be seen in the following excerpt from the court's sentencing order:

> In addition to the statutory circumstances set forth in Section 29-2523 . . . the terms of Section 29-2521 provide, in part, as follows: "In the proceeding for determination of sentence, evidence may be presented as to any matter that the Court deems relevant to sentence, ... Any such evidence which the Court deems to have probative value may be received. . . ."
>
> The court is also aware of the decision of the United States Supreme Court in the case of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), and the direction of [the Nebraska] Supreme Court to apply the rule of that case permitting the introduction of any mitigating evidence offered by the defendant which the Court deems to have probative value, even though such evidence may not specifically come within the scope of the statutory mitigating circumstances. Keeping that direction and guidance in mind, the Court has considered additional mitigating factors [requested by the

defendant].

The trial court clearly considered the mitigating circumstances presented by defendant.

The defendant argues that "Nebraska statutes, Section [sic] 29-2521, 29-2522, and 29-2523 are unconstitutional and void," brief for appellant at 90, since they do not require the sentencing court to make specific findings concerning a defendant's proposed nonstatutory mitigating circumstances. The defendant has not shown that he was prejudiced by the sentencing court's refusal to make specific findings concerning the defendant's proposed mitigating circumstances. The trial court considered the defendant's request. Some of defendant's proposed mitigating circumstances (e.g., Nos. 7 and 8) were not supported by the record. Others (e.g., Nos. 10, 11, and 12) are immaterial. Still others were the same as statutory circumstances.

The sentencing court fairly considered the defendant's proposed mitigating circumstances prior to rendering its decision. The Nebraska capital sentencing procedure fully complies in this regard with the requirements set forth by the U.S. Supreme Court. See, *Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

Defendant's assignments Nos. 42, 43, 44, 45, and 46 are without merit.

XXVI. "*Equally culpable Co-defendants should be sentenced as uniformly as possible to prevent the appearance of impropriety (Assignments #47 and #48).*"

Defendant argues that his sentence was excessive in that "equally culpable co-defendants" were given much less severe sentences. We first note that the only codefendant was Dennis Ryan, who was also convicted.

While it is true that others were involved in James Thimm's murder, the record shows that the defendant was the leader of the group and that the victim was tortured and killed on the defendant's orders. The actions of defendant and the others were not "equally culpable." See, also, *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980) (where only two of the three coperpetrators were charged with first degree

murder).

Defendant also argues that the "only reason which could account for this extreme disparity in sentence is that Michael W. Ryan had a lengthy and expensive trial and the Co-defendants plead [sic] guilty . . . ." Brief for appellant at 92. Defendant's assertion is unwarranted, unsupported by law or logic, and without merit. The record shows that James Thimm would not have suffered death absent the defendant's leadership.

Defendant's assignments Nos. 47 and 48 are without merit.

XXVII. "*Defendant's sentence was excessive (Assignments #49, #50, #51, and #52).*"

The defendant argues that his sentence was excessive. It is hard for this court to conceive of a more senseless and brutal murder. We have reviewed all criminal homicide cases pursuant to Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1985) and find that the defendant's death sentence is justified when compared to all other homicide cases. *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

XXVIII. "*The trial court erred in denying Defendant's showing to Court in addition to Defendant's motion to exclude death penalty, motion to exclude the death penalty, and specific objections to imposition of death penalty (Assignments #53, #54, #55, #56, #57, and #58).*"

In defendant's 60 assignments of error, the defendant has assigned the above-numbered six general statements, contending the trial court erred in its failure to review the motions made by the defendant in the court below, including defendant's motion to exclude the death penalty, defendant's additional motion to exclude the death penalty, and defendant's specific objections to imposition of the death penalty. The sum and substance of these general statements is contained in various other assignments of error and have been discussed above. We have reviewed these motions and the arguments made in support thereof, and conclude that the trial court's decisions denying these motions were not an abuse of discretion. These assignments are without merit.

XXIX. "*Cumulative effect of errors at guilt-innocence and life-death portions of trial deprived Defendant of a fair trial (Assignment #59).*"

In the defendant's 59th assignment of error the defendant contends that the combined effect of the errors assigned rendered the proceedings against him fundamentally unfair. He makes no real argument, nor does he cite any cases, to support such assertion. It is without merit.

Of more controlling effect is the doctrine of harmless error.

We held in *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988): "Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." This comports to the rule found in *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), wherein the U.S. Supreme Court stated:

> All of these [harmless error] rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

The Court in *Chapman* further held that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.

In *Rose v. Clark*, 478 U.S. 570, 576, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), the U.S. Supreme Court stated:

> In *Chapman v. California*, 386 U.S. 18 (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. And since *Chapman*, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."

In view of all of the evidence before the jury, we conclude

that the combined effect of the errors defendant alleged occurred at trial was harmless beyond a reasonable doubt and that the defendant was not prejudiced by these alleged errors. This conclusion is supported by the overwhelming evidence against the defendant, including the defendant's own testimony as to his part in the murder of James Thimm. The cumulative effect of these alleged errors did not have a material effect on the jury in reaching its verdict. A defendant is not constitutionally entitled to receive a perfect trial, only a fair and constitutional trial. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984).

XXX. "*The Nebraska Supreme Court should not limit brief size in a capital case (Assignment #60).*"

Defendant has a fundamental problem with the meaning of the word "brief." The defendant filed a motion requesting leave to file a 191-page brief with this court. This motion was denied, and the defendant was allowed to file a 100-page brief with 60 assignments of error. The defendant's case has been argued zealously in all stages of the proceedings. We also note that the Attorney General only addressed 15 of the 60 assignments made by the defendant. The defendant cannot predicate error on this court's denial of his motion requesting leave to file a 191-page brief.

As stated before, this court is charged with the automatic review of all cases in which the death penalty has been imposed. § 29-2525. This court has separately reviewed each of defendant's assignments of error. The decision of the Richardson County District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. RYAN, APPELLEE, LOUIE M. LIGOURI, APPELLANT.

444 N.W.2d 656

Filed August 11, 1989. No. 86-879.

1. **Attorney Fees.** Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires that court-appointed attorneys shall be paid reasonable fees and reasonably necessary expenses for services performed pursuant to their appointment.
2. **Effectiveness of Counsel.** Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded with directions.

Charles D. Hahn for appellant, and Louie M. Ligouri, pro se.

Douglas E. Merz, Richardson County Attorney, for appellee State.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Michael W. Ryan, defendant in *State v. Ryan, ante* p. 74, 444 N.W.2d 610 (1989), was represented in the trial court by Louie M. Ligouri (applicant), an attorney in the private practice of law in Auburn, Nemaha County, Nebraska, and Richard Goos of Lincoln, Lancaster County, Nebraska. Both were court-appointed to represent defendant at the trial level in the case in which defendant was charged, in two counts, with the first degree murders of Luke Stice and James Thimm. The two charges were separated for trial, and only the Thimm case was tried. After that trial, defendant pled guilty to a charge of second degree murder in connection with the death of Luke Stice. Applicant was first appointed by the county court for Richardson County on August 23, 1985, and by the district court on October 8, 1985. He represented defendant in the county court proceedings and, after defendant was bound over to the district court, in the district court.

Richard Goos was an assistant public defender in Lancaster County and was appointed by the district court for Richardson County to represent defendant as cocounsel with applicant. The payment for the representation by Goos was provided for by a contract between Richardson and Lancaster Counties. The contract itself is not before this court, but evidence shows that Goos was to continue to be paid by Lancaster County as an assistant public defender, at his regular salary with attendant fringe benefits, and that Richardson County would reimburse Lancaster County at the rate of $30 per hour for each hour Goos devoted to representing defendant Ryan. Testimony at the fee hearing on Ligouri's applications for fees indicated that Ligouri was also to represent Ryan, as cocounsel, both because it was difficult for one attorney to represent a defendant in a possible capital case and because Goos could not devote sufficient time, on his own, to represent Ryan without assistance.

Applicant represented Ryan from applicant's initial appointment on August 23, 1985, until the court discharged applicant on April 25, 1986. On June 27, 1986, applicant filed his amended fee application, seeking payment of fees. This application showed that applicant had spent 605 hours of time defending Ryan from December 1, 1985, to the date of his discharge. An earlier fee application, filed December 9, 1985, sought payment for 94 hours for services by applicant in November 1985. Applicant thus sought payment for 699 hours of service. After a fee hearing on September 4, 1986, the trial court ordered applicant be paid the total sum of $8,776 for services from August 23, 1985, to his termination. The court further found that applicant had been paid $3,208.25 for his services in county court and district court from August 23 to November 1, 1985; that this sum should be deducted from the total award of fees; and that, therefore, applicant should be paid the additional sum of $5,567.75. The trial court made no specific finding as to hours served by applicant nor as to the rate to be charged.

Applicant timely appealed to this court, assigning as error that the action of the trial court was contrary to law and erroneous in that it did not make a proper allowance for

expenses and fees for applicant in his appointed representation of Ryan. Applicant also sought interest on any amount due him. For the reasons set out below, we reverse the order of the trial court and fix the appropriate fees in this court, but do not make an award for interest.

The brief of Richardson County in this court does not challenge the rate requested by applicant, nor the number of hours submitted for payment. The only points raised are the technical points as to the appropriate form of claim and of payment, discussed and determined adversely to the county in *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987). Since that case disposed of the underlying issues, those issues will not be discussed again in this opinion.

The record before us shows the following. Applicant was first appointed by the county judge for Richardson County and was first paid $2,000 by the county court for his representation of Ryan for the period of time from August 23 to September 23, 1985, at an apparently agreed rate of $50 per hour for legal services and traveltime, plus .21 per mile for miles traveled. Applicant was also paid for the time from September 23 to October 31, 1985, at the same rates by the trial court. Applicant made later applications for fees, but no further payments were authorized by the trial court.

In a telephone conversation between the trial judge and applicant on December 5 or 6, 1985, the trial judge informed applicant that future payments would be at the rate of $30 per hour and only for hours authorized by the court. Applicant was not satisfied with the hourly rate, nor with the court's involvement with applicant's representation of defendant, and therefore he prepared an order for the court to sign terminating his appointment. Goos then filed a motion that the trial court keep applicant on the case with appropriate remuneration, because Goos felt he alone could not devote sufficient time to the case to represent defendant properly. The record before us does not show that the motion was ever acted on. Because of applicant's continued representation of defendant, it is clear that the trial court did not sign applicant's proposed order.

The controlling statute on the fee questions is Neb. Rev. Stat. § 29-1804.12 (Reissue 1985), which provides:

> Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him or her for all expenses reasonably necessary to permit him or her to effectively and competently represent his or her client and for fees for services performed pursuant to such appointment except if the defendant was not bound over for trial in the district court, the application shall be made in the appointing court. The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court.

At the hearing on applicant's fees, the transcript of the fee hearing in the *Rehm and Faesser* case was received in evidence without objection. The trial court noted in that hearing that it thought $50 per hour was an appropriate rate. In the applicant's case, the trial court reduced the hours sharply by examining everything done by applicant in the way of taking depositions, investigating, or consulting with his client, and by not allowing for any time spent by applicant which the trial court determined not to be "necessary." There was no specific finding as to what was "necessary."

The record before us shows that, in the fee hearing, the trial court cross-examined witnesses produced by applicant and made factual statements contradicting evidence adduced by applicant. The trial court's participation in the hearing made it inappropriate for the trial court to make dispositive rulings on applicant's fee applications. Because our analysis of the facts before us discloses, without any doubt, that substantial hours claimed to be devoted to Ryan's representation were spent in applicant's representation of Ryan, we set applicant's fee, in this court, to avoid a further remand.

First of all, the record shows that applicant was present in court for 7 days during the voir dire of prospective jurors. Additionally, 18 days were spent in the actual trial of the cases of defendants Michael Ryan and Dennis Ryan. Of these days, 9 were used by the State in presenting its cases and 9 were used in presenting defendants' cases. In addition, 3 full days were spent in instruction conferences and in final argument after the

evidentiary portion of the trial was concluded.

The defense was somewhat convoluted in that, after others involved in the crimes testified for the State, defendant's only real chance of acquittal was a successful defense of insanity. The matter of the sentence of defendant had to be a real concern throughout the trial. Defendant was tried jointly with his son, and in representing the son, the son's attorneys tried to put as much blame on defendant herein as possible, in order to enhance the son's chances. Since Michael Ryan and his son were tried in a joint trial some confusing positions had to be adopted by the trial attorneys.

At any rate, we calculate each day actually in court as a 6-hour trial day. On each trial day, applicant set out an additional 2 or 3 hours devoted to preparation for the trial. We are satisfied that applicant devoted a total of 8 hours each trial day to representing defendant herein. The total of such time is 8 hours times 28 days, or a total of 224 hours.

Additionally, it is totally appropriate that applicant's amended fee application is recognized as correct in setting out that on each weekend (Saturday and Sunday) during the trial for 5 weeks, applicant spent approximately 6 hours in preparing for trial and in appropriately consulting with defendant and with applicant's cocounsel. This amounts to an additional 30 hours.

In addition, six progression hearings were held after November 1, 1985, by order of the court. Applicant was present at four of those hearings. From our examination of the record, it can be determined that four additional days of court time were required for the progression hearings and other interim motion hearings. The record indicates that such hearings averaged 2 hours per day, or an additional time of 8 hours.

An additional item of controversy is traveltime. The murders of James Thimm and Luke Stice occurred near Rulo, Richardson County, Nebraska, located in the extreme southeast corner of Nebraska. We can only assume that the trial court was unable to provide defendant Ryan with adequate defense counsel in Richardson County. The problem is self-evident, because additional attorneys had to be provided for other defendants (Timothy Haverkamp, James Haverkamp, Dennis

Ryan, and John David Andreas). The pool of attorneys who would, or could, represent such defendants was not large. It is futile to appoint an attorney some distance away to represent a defendant and not to provide compensation for that attorney to reach his client.

As a result, applicant, from Auburn, Nemaha County, Nebraska (35 miles from Falls City, the Richardson County seat), and another Auburn attorney were appointed, as were three attorneys from Lancaster County, one from Pawnee County, and two from Richardson County, to represent various of the five persons involved in the torture and murder of James Thimm. The four attorneys representing Timothy Haverkamp, James Haverkamp, and Andreas were involved a lesser time because their clients agreed to, and did, testify for the State in exchange for lighter sentences. We note, in passing, that such other attorneys were paid at the rate of $50 per hour for at least some of the limited time they served. The upshot was a great deal of traveltime involved for applicant—particularly after the actual trial was moved to Douglas County, some 65 miles from Auburn, and defendant Ryan was incarcerated in Sarpy County. Applicant sought only $332 for travel miles (at an apparently agreed upon rate of .21 per mile). In addition, under the circumstances of this case, defendant should be reimbursed for his time spent in traveling. That time is set out in the fee applications as 49 hours (in addition to 11 hours noted by applicant but not billed).

It can thus be seen that in court-connected time alone, applicant has spent 311 hours in the defense of Michael Ryan. With the trial court's statement that $50 per hour was a reasonable rate, and considering the fact that six witnesses testified that $50 per hour was a minimum rate and that some of these witnesses testified that a reasonable rate would be $65 to $120 per hour, we determine that under the facts of this case, $50 per hour is a reasonable rate. Applicant is entitled to the sum of $15,550 for such court-connected hours alone, without any consideration of research and investigative time spent on the case. The trial court's finding that applicant is entitled to a total of $8,776 for time devoted to the appointed defense of Michael Ryan from August 23, 1985, to April 25, 1986, is not

supported in any way by the undisputed evidence in the record. The order of the trial court as to the fees to be awarded applicant is an abuse of discretion and is hereby set aside and reversed.

In addition to the hours set out above, applicant's fee applications set out that approximately 337 additional hours were spent between November 1, 1985, and April 25, 1986, in investigating the factual background; taking statements and depositions; interviewing his client; researching the law, particularly the insanity issues; conferring with witnesses, including a psychiatrist called by the defense; reviewing evidence, including tapes; preparing for the testimony of the State's psychiatric witness; and appropriately consulting with cocounsel and conferring with all counsels in the case; and in general preparation for depositions and for the trial. A witness list of 58 witnesses was submitted at one time as witnesses to be called. Twenty-four witnesses were actually called by the State at trial. Thirty-one witnesses were called by defendant Dennis Ryan and 11 by defendant Michael Ryan. The record shows mention of other witnesses at other times. Many of these witnesses had to be interviewed and many were deposed. There are in the record of this phase of the trial 14 depositions taken by applicant, either alone or with his cocounsel. The deposition of the father of Luke Stice was 469 pages long. The record before us shows many other depositions were taken. We have reviewed carefully the applicant's fee applications and are not able to conclude that any of his time spent was not necessary. It is the determination of this court that applicant, between November 1, 1985, and February 24, 1986, spent an additional 337 hours in preparing for trial of the Ryan cases.

The trial court's answer to much of applicant's time spent in depositions was that the various police reports were available to defendant's counsel and depositions were unnecessary in most cases. Such an assumption is without foundation in fact or logic.

The ABA Standards For Criminal Justice standard 4-4.1 (2d ed. 1986) provides:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits

> of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

A defense lawyer's obligation to investigate seldom can be satisfied by a mere search of police records. It is obvious that statements in such reports may or may not be true, and such statements have to be the subject of closer scrutiny than a mere reading.

Following the trial, applicant spent additional time on posttrial motions and conferences. The amended fee application indicates 12 hours were spent on such activity from April 8 to the time of applicant's termination on April 25, 1986.

Some 349 hours over 133 days (the time between November 1, 1985, and the beginning of the trial on February 24, 1986, and after trial from April 8 to April 25) in legal work relating to the case against defendant cannot be considered excessive. If action had not been taken, the effectiveness of appointed counsel in representing Ryan would be questioned in this court, and in any other court in which Ryan's conviction is reviewed. The greatest number of cases of ineffective counsel rests on allegations by defendants of insufficient investigation and failure to communicate with defendant. As stated in *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Obviously if the representation of defendant was ineffective, the case would have to be retried at additional expense.

We determine that applicant properly spent an additional 349 hours in out-of-court investigation, consultation, and preparation for trial, and in posttrial activities, and that counsel should be paid at the rate of $50 per hour for such time spent. Applicant is entitled to $17,450 for such additional services beyond time actually spent in court.

This means applicant is entitled to a total additional fee of $33,000, plus $332.00 in travel expenses and $207 in telephone

expenses.

For this court to approve the amount awarded to applicant by the trial court would be to send a message that the sixth amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution have no real meaning. This case was a disaster to many, aside from the two victims of Michael Ryan. Among those affected are the taxpayers of Richardson County and of the State. The fact remains, however, that the attorneys appointed to represent the defendants in this bestial event are not guilty of any crime. They are honorable professional people and have been appointed by a court to perform a duty required by the Constitution. It is not appropriate to subject attorneys, appointed or otherwise, to the treatment seen in the fee hearing in this case. In such hearings, it is not appropriate to require appointed attorneys to submit income tax records to the court, as was done in this case, nor to submit such things as the attorney's notes made in preparation for final argument, as requested in the *Rehm and Faesser* case.

In horrifying cases such as this case, it is vital that we, as a State and a nation, maintain our decree of civilization and reliance on our Constitution. We must not sink to the level of nations that execute transgressors the morning after alleged offenses occur. Defense attorneys perform an absolutely essential function under our Constitutions and must be treated as honorable persons performing a necessary legal duty.

We note that applicant seeks interest on the amounts due him. He cites Neb. Rev. Stat. § 45-104 (Reissue 1988). The sum due Ligouri was not liquidated, but had to be evaluated and calculated. Interest is not due under such circumstances. The judgment of the trial court on the issue of fees granted for Louie M. Ligouri is reversed, and the cause is remanded with directions to enter an order in conformity with this opinion. It is to be understood that the fee herein awarded is for services rendered by Ligouri to defendant in both the Thimm and Stice matters and that the fees awarded herein are in addition to amounts paid to applicant before November 1, 1985.

REVERSED AND REMANDED WITH DIRECTIONS.

ROSE CASSIO, SPECIAL ADMINISTRATOR OF THE ESTATE OF MICHAEL R. CASSIO, DECEASED, APPELLANT AND CROSS-APPELLEE, V. CREIGHTON UNIVERSITY, A NONPROFIT CORPORATION, APPELLEE AND CROSS-APPELLANT.

446 N.W.2d 704

Filed August 11, 1989. No. 87-310.

1. **Trial: Evidence: Appeal and Error.** A party may not complain on appeal of the admission of evidence to which no objection was made at the time of the offer.
2. **Ordinances: Pleadings: Negligence.** Evidence of an ordinance and its violation, although not pled, is admissible, if properly offered, under a general averment of negligence when it is relevant to a material issue in the case.
3. **Appeal and Error.** Upon appeal involving a question of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.
4. **Recreation Liability Act.** The Nebraska Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1988), does not apply to independent indoor recreational facilities, including indoor swimming pools.
5. **Negligence.** An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury; (2) his or her conduct concurs and cooperates with the defendant's actionable negligence; and (3) his or her conduct contributes to his or her injuries as a proximate cause.
6. **Directed Verdict.** In order to sustain a motion for a directed verdict or for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
7. _____. In considering the evidence for the purpose of a motion for a directed verdict or for judgment notwithstanding the verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
8. **Negligence: Liability: Words and Phrases.** The doctrine of assumption of risk involves a choice made more or less deliberately and negatives liability without reference to the fact that the party seeking recovery may have acted with due care, whereas the defense of contributory negligence implies the failure of the party seeking recovery to exercise due care.
9. **Negligence.** Where one knowing and comprehending the danger voluntarily exposes himself or herself to it, although not negligent in so doing, he or she is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.
10. **Jury Instructions: Appeal and Error.** On appeal, the Supreme Court examines instructions given to determine whether they are a correct statement of the law.
11. _____: _____. It is not error on the part of the trial court to refuse to give a

requested instruction if the substance of the request is in the instruction actually given.

12. **Jury Instructions: Proof: Appeal and Error.** In order to establish as error the trial court's refusal to give a tendered instruction, the party complaining is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.
13. **Trial: Witnesses: Evidence.** A witness without qualifications may not be permitted to offer an opinion regarding a matter requiring scientific, technical, or other specialized knowledge.
14. _____: _____: _____. Testimony of a witness in the form of opinion which is pure speculation should not be received in evidence.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Debra R. Nickels and James R. Welsh, of Welsh & Sibbernsen, for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Plaintiff, special administrator of the estate of Michael R. Cassio, Cassio's sister, appeals from the order of the district court granting defendant Creighton University's motion for a new trial. This followed a jury verdict in favor of the plaintiff in a wrongful death action in the amount of $118,940. Creighton cross-appeals from the rulings of the district court overruling its motions for directed verdict and judgment notwithstanding the verdict.

Plaintiff simply assigns as error the action of the trial court which granted Creighton a new trial. On cross-appeal Creighton contends the trial court erred in not sustaining its motions for a directed verdict or for a judgment notwithstanding the verdict because (1) the evidence established as a matter of law that the plaintiff's action was barred by the Nebraska Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1988); (2) the evidence conclusively established that Cassio was guilty of contributory negligence more than

slight sufficient to bar recovery; and (3) the evidence established as a matter of law that Cassio was guilty of assumption of the risk.

Cassio, plaintiff's decedent, was a 31-year-old bachelor who had been in the U.S. Air Force for the past 10 years. His mother lives in New Jersey, and Cassio would visit home as his duties would permit, would call or write home usually once a month, and would send his mother $100 every month. Considering the mother's life expectancy of 15.04 years, and calculated at a 6-percent interest rate, this monthly payment would have a present worth of $11,673.59. In addition, Cassio's hospital bill amounted to $1,217.14, and the funeral bill was $2,927.

On May 14, 1984, Cassio went swimming in Creighton's pool located in the Kiewit Center. He put on scuba gear which consisted of a compressed air tank, a mask, a mouthpiece and regulator, a buoyancy compensator, a weight belt, and fins. He swam laps with his scuba gear on for 30 to 45 minutes. After that, he moved to the deep end of the pool and began doing breathing exercises, repeatedly submerging and coming up again.

Only one lifeguard, Catherine Dalipe, was on duty while Cassio was in the pool. Apparently, she had taken and passed a course at Creighton in advanced lifesaving. She had been sitting on the elevated guard stand when Cassio first came into the pool, but later moved down to a deck chair beside the pool.

At about 4:45 p.m. Dalipe's supervisor, Mike Hardigan, came in, and they talked for about 10 minutes. While they were talking, their attention was directed to the deep end of the pool by Kevin Croft, who had been working out with weights in the vicinity of the pool. He had seen a girl, whose identity is unknown, walk past the deep end of the pool, look down, and then step back and stick her hand to her mouth. She walked over to Dalipe and Hardigan, and they got up and started running. At that time, Croft jumped over the fence between the pool and the weight lifting area. When Croft got to the pool, Dalipe was diving in. According to Croft, Cassio was lying on his back on the bottom of the pool with his tank and weight belt off his body, but his buoyancy compensator was still strapped on. Dalipe tried to lift Cassio off the bottom, but could not

because he was too heavy. She came back up and said she was hurt. Dalipe testified that Cassio was still wearing his scuba gear. Croft then dove in and brought Cassio up and got him out of the pool with Hardigan's assistance. Croft noticed a pink champagne-like froth coming out of Cassio's mouth, and Cassio's face was cyanotic. CPR was attempted, paramedics arrived, and Cassio was taken to the hospital, where he was pronounced dead.

Plaintiff's petition alleged several acts of negligence on the part of Creighton University relating to the operation of its pool. Creighton in turn answered by alleging that the action was barred by the Nebraska Recreation Liability Act and that Cassio was guilty of contributory negligence and assumption of risk in diving without a partner. At the close of plaintiff's case, leave was granted plaintiff to strike the specific acts of negligence originally alleged and to simply state that Creighton was negligent in "failing to properly life guard its swimming pool while Michael Cassio was in this pool on 5/14/84."

At trial the plaintiff offered in evidence Omaha ordinances which stated that two lifeguards were required to be present at pools the size of Creighton's and which also required a pool of Creighton's classification to be under the immediate supervision of a certified operator. Evidence was also introduced indicating Creighton's violation of the ordinances by having only one lifeguard on duty and no certified operator. Creighton specifically stated that it had no objection to the reception into evidence of those ordinances and regulations.

Following the verdict in favor of the plaintiff, Creighton filed a motion for judgment notwithstanding the verdict or alternatively for a new trial. In its motion for a new trial Creighton contended, among other things, that the trial court erred in admitting evidence of violation of the ordinances because violation of the ordinances had not been specifically pleaded; in allowing a lay witness with no medical training to give his opinion, over objection, as to the cause of death; and in refusing to submit as part of the jury instruction on present cash value the present worth table and examples contained in NJI 4.13, although specifically requested to do so by Creighton.

Subsequent to Creighton's motion for judgment notwithstanding the verdict or for a new trial, plaintiff moved, pursuant to Neb. Rev. Stat. § 25-852 (Reissue 1985), to amend the petition to conform to the evidence.

The trial court sustained Creighton's motion for a new trial, finding that "the pleading of a city ordinance under the law of the State of Nebraska is essential to an allegation of negligence premised on a breach of that ordinance." The trial court further found:

> Plaintiff's Motion for Leave to Amend its Petition to allege specifically the city ordinance involved, and to conform the allegations of the Petition to the evidence adduced will not correct the original error of the Court in permitting evidence of such violation of said ordinance to be received; and that therefore, said Motion should be denied.

ADMISSIBILITY OF THE ORDINANCES

We consider first Creighton's complaint regarding the admissibility of the Omaha city ordinances. That may be disposed of quickly by simply referring to the record and the fact that the ordinances were received without objection by Creighton. It cannot now complain of the admission of evidence to which no objection was made. See *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988).

Second, evidence of an ordinance and its violation, although not pled, is admissible, if properly offered, under a general averment of negligence when it is relevant to a material issue in the case. See, *Owen, Administrator v. Moore*, 166 Neb. 226, 88 N.W.2d 759 (1958); *Carter v. Zdan*, 151 Neb. 185, 36 N.W.2d 781 (1949); *Omaha Street R. Co. v. Larson*, 70 Neb. 591, 97 N.W. 824 (1903). We see no reason why that rule should not apply in this case.

The plaintiff's allegations in the first instance, as well as the amended allegation that Creighton was negligent in failing to properly lifeguard its swimming pool, were broad enough and general enough that an ordinance establishing the required number of lifeguards is relevant to prove the alleged negligence in failing to properly lifeguard the pool.

THE RECREATION LIABILITY ACT

The issue as to the Nebraska Recreation Liability Act refers to §§ 37-1001 et seq. The purpose of the Nebraska Recreation Liability Act is "to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon . . . ." § 37-1001. Accordingly, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." § 37-1002.

Under the act,

> an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

§ 37-1003. However, an owner is still liable "(1) for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, or (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land." § 37-1005. Therefore, the owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility. In this instance, there was evidence which would support an inference that Cassio had paid a fee for his admission to the pool.

However, we further examine the applicability of the act to this case. Under the act, "land" includes "roads, water, water courses, private ways and buildings, structures, and machinery or equipment thereon when attached to the realty." § 37-1008(1). "Recreational purposes" includes, but is not limited to "[h]unting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water-skiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using

land for purposes of the user." § 37-1008(3).

Disregarding the issue as to whether Cassio paid an admission fee for use of the pool, it must first be determined whether the Recreation Liability Act applies to indoor swimming pools as being included within the definition for lands for recreational purposes. Since this is a question of law, this court has an obligation to reach an independent conclusion. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

The Supreme Court of Pennsylvania, in *Rivera v. Philadelphia Theological Seminary*, 510 Pa. 1, 507 A.2d 1 (1986), held that the owner of an indoor swimming pool is not immune under Pennsylvania's Recreation Use Act.

The court explained:

> We turn first to the Seminary's contention that its liability for young Rivera's death is precluded under the provisions of the Recreation Use Act. Specifically, the Seminary would have us construe the Act to immunize any owner of a swimming pool from liability so long as no admission fee is charged for its use. Both public policy and the legislative history of the Recreation Use Act show that it was not intended to, and should not, apply to immunize the Seminary from liability for negligence in the maintenance of its indoor swimming pool. The policy implications of such a result are so far-reaching and out of harmony, generally, with the modern trend in tort law that we cannot ascribe an intent to immunize owners of indoor pools from tort liability for foreseeable harm without a stronger indication of such intent than we can discern in this statute.
>
> The stated purpose of the Recreation Use Act is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." 68 P.S. § 477-1. An owner of recreational land, as defined in the statute, "owes no duty of care to keep the premises safe for entry or use by others for recreational purposes." 68 P.S. § 477-3. An owner who "directly or indirectly invites or permits without charge

any person to use such property for recreational purposes" does not incur liability for injury to such persons, 68 P.S. § 477-4, except "[f]or wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." 68 P.S. § 477-6.

"Recreational purpose," under the Act, "includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports and viewing or enjoying historical, archaeological, scenic, or scientific sites." 68 P.S. § 477-2.

. . . .

The Recreation Use Act is therefore designed to encourage the opening up of large, private land holdings for outdoor recreational use by the general public by limiting the liability of the landowner. Considering that purpose, we believe the Legislature intended to limit the meaning of the words "buildings, structures and machinery or equipment when attached to the realty" in Section 2 of the Act, 68 P.S. § 477-2, to ancillary structures attached to open space lands made available for recreation and not to enclosed recreational facilities in urban regions. Grammatically, this construction is indicated by the dual presence of the conjunctive "and" in the list, both before "buildings" as well as after "structures." The position of the limiting clause "when attached to the realty" at the end of the sentence is another such indication. All of these factors make it appropriate to treat the list beginning with the word "buildings" as a restrictive modifer [sic] of "land, roads, water, watercourses." *Id.*

The intention of the Legislature to limit the applicability of the Recreation Use Act to outdoor recreation on largely unimproved land is evident not only from the Act's stated purpose but also from the nature of the activities it listed as recreational purposes within the meaning of the statute. Specifically, with the exception of "swimming," which may be either an indoor or outdoor sport, the recreational activities enumerated in the statute

> are all pursued outdoors.
>
> . . . .
>
> Consequently, neither the language nor the purposes of the Recreation Use Act require a construction which applies its immunity to the Seminary's indoor pool. Instead, they induce us not to so construe it. Accordingly, we hold that the Seminary is not immune from tort liability under the provisions of Pennsylvania's Recreation Use Act.

507 A.2d at 6-9. The court noted in a footnote that "[t]he need to limit owner liability derives from the impracticability of keeping large tracts of largely undeveloped land safe for public use. The same need does not arise in the case of indoor recreational facilities which, in contrast, are relatively easy to supervise and monitor for safety hazards." 507 A.2d at 8 n.17.

In *Gibson v. Keith*, 492 A.2d 241 (Del. 1985), the court limited application of Delaware's recreational use immunity statute "to the recreational use of essentially undeveloped land and water areas (primarily rural or semi-rural land, water or marsh)" and found the statute "not applicable to urban or residential areas improved with swimming pools, tennis courts and the like." *Id.* at 244.

The appellant in *Erickson v. Century Management Company*, 154 Ga. App. 508, 268 S.E.2d 779 (1980), sued to recover for personal injuries she sustained while swimming in a pool on the premises of a motel owned and operated by the appellees. The appellant, not a customer of the motel, was attending a party given by the management in celebration of the Fourth of July. The public was invited but no admission was charged.

The trial court awarded summary judgment to the appellees on the basis of Georgia's recreational use statutes. The appellant contended on appeal that the statutory immunity does not apply to the operation of a swimming pool owned by a private business. In reversing the trial court, the appellate court said:

> The stated purpose of the Act is "to encourage owners of land to make land and water areas available to the public for recreational purposes . . ." Code Ann.

> § 105-403. We do not believe that the term "land and water areas" can reasonably be construed to encompass a swimming pool. Instead, the term clearly has reference to larger bodies of water, i.e., lakes and seashores. The appellees base their contention that the Act specifically applies to this case on the fact that swimming is one of the recreational purposes listed in Code Ann. § 105-404(c), which provides that the term "recreational purpose" "includes, but is not limited to hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites." However, we view this language as a further indication that the Act was intended to apply only to relatively large tracts of land and water, since only two or three of these activities could conceivably be done in any other setting.

154 Ga. App. at 508-09, 268 S.E.2d at 780.

The court in *Keelen v. State, Dept. of Culture, Recreation*, 463 So. 2d 1287 (La. 1985), held that Louisiana's recreational liability statutes did not immunize the State from a wrongful death claim for the drowning of plaintiff's decedent in a swimming pool in a state park. The court stated:

> [I]t is clear that a swimming pool is not the type of instrumentality commonly found in the true outdoors. Rather, swimming pools are most often found in residential backyards. We recognize that "swimming" is included in the list of recreational activities in La.R.S. 9:2795; however, the word should be construed by reference to the context in which it is found. . . . Such consideration leads to the conclusion that the legislature intended to grant immunity for injuries incurred while swimming in lakes, rivers, ponds or other similar bodies of water. Thus, an injury which occurs in a swimming pool is not subject to a defense of immunity under La.R.S. 9:2791 and 2795. It follows that the State cannot assert these statutes in order to avoid liability in the instant case.

463 So. 2d at 1290-91.

Some courts have gone so far as to hold that there is no

immunity under a recreational liability act for backyard swimming pools. See, *Glittenburg v Wilcenski*, 174 Mich. App. 321, 435 N.W.2d 480 (1989); *Loyer v. Buchholz*, 38 Ohio St. 3d 65, 526 N.E.2d 300 (1988); *Boileau v. De Cecco*, 125 N.J. Super. 263, 310 A.2d 497 (1973), *aff'd* 65 N.J. 234, 323 A.2d 449 (1974).

Although we previously have held that the provisions of the Nebraska Recreation Liability Act do apply to urban as well as to rural areas, *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987), there are no Nebraska cases in which the act is applied to indoor recreational activities or swimming pools. We therefore hold that the act does not apply to independent indoor recreational facilities, including indoor swimming pools. Therefore, the trial court did not err in failing to grant Creighton's motions for directed verdict or for judgment notwithstanding the verdict on the basis of the Nebraska Recreation Liability Act.

CASSIO'S CONTRIBUTORY NEGLIGENCE

Creighton argues that it was entitled to a directed verdict or judgment notwithstanding the verdict because as a matter of law Cassio was contributorily negligent to a degree sufficient to bar plaintiff's recovery.

An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury; (2) his or her conduct concurs and cooperates with the defendant's actionable negligence; and (3) his or her conduct contributes to his or her injuries as a proximate cause. *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989); *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

However, in order to sustain a motion for a directed verdict or for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for the purpose of such a motion, the party against whom a motion is made is entitled to have every controverted fact resolved in his or her favor and

to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989). A jury verdict will not be disturbed unless it is clearly wrong. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

Creighton's scuba expert, Don Stanger, testified that a scuba diver should never dive alone; i.e., he should always have a diving buddy present with him when making dives. Stanger had become certified as a scuba diver in 1971 and became a scuba instructor in August of 1974. In between he had received ratings as an advanced diver, diver master, and assistant instructor, all requirements to become an instructor. However, the record does not disclose whether these certifications came from the Red Cross, the YMCA, or some other organization. At the present time Stanger owns and runs a scuba shop in Omaha.

On the other hand, plaintiff's scuba expert testified that when scuba diving alone in a swimming pool, the lifeguard becomes the buddy of the diver. Furthermore, according to the plaintiff's expert, the rule against diving alone applies primarily to open water, where the dangers to a diver are greater. Plaintiff's expert, Ralph Johnson, is an associate professor of health, physical education, and recreation; the director of aquatics, and a diving coach at Indiana University. Johnson has a bachelor of science in education with majors in social studies and health and physical education and has a master of science degree in education. He is currently completing his doctoral work, Ph.D., in sports administration. His duties as director of aquatics concern programming the swimming pool, which includes staffing it with lifeguards, providing inservice training, and scheduling the pool for university classes. He has taken many courses in aquatics, water safety, lifesaving, lifeguarding, scuba diving, small craft, use of canoes and sailboats, pool management, pool design, and pool operation. He was originally trained in scuba diving in 1955. In 1961 he achieved his instructor's certification through the national YMCA scuba program and has been serving in that capacity ever since, teaching on the university level and also to the public. He has

been certified by the Professional Association of Diving Instructors for a period of about 10 years. He is also certified as a scuba instructor by the YMCA of the U.S.A. He has just completed writing large sections of the YMCA Scuba Instructor's Leadership Manual, which is used for training YMCA scuba instructors.

Given the conflicting testimony of the scuba experts on the propriety of a scuba diver's diving alone, this court cannot conclude that as a matter of law Cassio was contributorily negligent. This was an issue for the jury to decide upon proper instructions, which it did. The trial court did not err in failing to grant Creighton's motion for a directed verdict or for judgment notwithstanding the verdict.

ASSUMPTION OF THE RISK

Creighton also argues that as a matter of law Cassio had assumed the risk of diving alone, and therefore a verdict should have been directed in favor of Creighton on that basis.

The only evidence in the record remotely relating to this issue came from Creighton's witness Stanger. He testified as follows:

> Q. In your opinion, sir, did Mr. Cassio then deviate from the standard of care in holding his breath when he arose?
>
> A. I'd say so, yes.
>
> Q. Now, there has been evidence here that Mr. Cassio was a scuba diver for approximately ten years. In your opinion, sir, would a scuba diver with ten years' experience know and appreciate the dangers of diving alone, and holding his breath?
>
> A. Just from the length of time he has been diving, I'd say yes.

Language including "standard of care," "[i]n your opinion," and "would a scuba diver with ten years' experience know" is the language of negligence or of tort law.

Courts, including this one, have had difficulty dealing with the two concepts: negligence and assumption of risk. *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943), contains a comprehensive explanation and comparison of the two doctrines. This court stated:

Is the defense of assumption of risk in negligence cases under the maxim *"volenti non fit injuria"* consistent with the defense of contributory negligence? A discussion of this distinction is found in 38 Am. Jur. 847, sec. 172: "The defense of assumption of risk is closely associated with the defense of contributory negligence. One who does not exercise ordinary care for his own safety is said, speaking broadly, to assume the risk, that is, take the chance, of being hurt. The defense of assumption of risk is not incompatible with contributory negligence; the two defenses may arise under the same state of facts. Some courts regard the defenses as interchangeable. However, there is a clear distinction between the defense of assumption of risk and the defense of contributory negligence, notwithstanding they may arise under the same set of facts and may sometimes overlap. There is a line of demarcation which, if carefully scrutinized and followed, will allow the court to differentiate between them. Assumption of risk rests in contract or in the principle expressed by the ancient maxim, "*volenti non fit injuria*," whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff to exercise due care. As stated in some decisions, assumption of risk is a mental state of willingness, whereas contributory negligence is a matter of conduct." A further discussion of this will be found in 45 C.J. 1043, sec. 600. As stated in *White v. McVicker, supra*: "While the doctrine of contributory negligence and assumption of risk may arise under the same set of facts and sometimes thus overlap each other, yet we have consistently distinguished them and held that they are distinct and separate and must not be confounded with each other." As stated in *Watterlund v. Billings, supra*: "There is a distinction between the doctrine of contributory negligence and the doctrine of assumed risk, since there may be the voluntary assumption of the risk of

> a known danger such as will bar one from recovery for injury to person or property, even though in the exercise of due care." [Citations omitted.] Assumption of risk under the maxim *"volenti non fit injuria"* involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas, the defense of contributory negligence implies the failure of the plaintiff to exercise due care. It may be said that contributory negligence involves the notion of some fault or breach of duty on the part of the one charged therewith, or a failure to use such care for his safety as an ordinary prudent person would have used under the same or similar circumstances. On the other hand, under the assumption of risk, even though the risk be obvious, the person may be free from any suggestion of fault or negligence on his part. While under a certain set of facts the two may be difficult to distinguish and sometimes seem to overlap, yet when carefully considered they can be distinguished and are distinct and separate and not inconsistent.

Landrum v. Roddy, supra at 946-47, 12 N.W.2d at 89.

Creighton cites *Hollamon v. Eagle Raceway, Inc.*, 187 Neb. 221, 188 N.W.2d 710 (1971), in support of its contention that Cassio assumed the risk of drowning by diving alone. In *Hollamon*, this court reiterated that one who participates in the sport of stock car racing assumes the ordinary risks of that sport, including injury when a car goes out of control and enters the pit area. According to the court, "where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." *Id.* at 224, 188 N.W.2d at 711.

In *Hollamon*, the court said:

> There is no factual dispute that plaintiff knew and appreciated the danger of being in the pit area. Plaintiff's car on previous occasions had generally been in this same area. He was aware that he was directly east of the opening off the first turn while in the pit area. Plaintiff conceded that there are some risks incident to racing, and estimated

> that if he were to consider racing accidents over the whole racing season they would average one an evening. He stated that he would expect cars to go out of control on occasions, and had considered the possibility of an accident from a car coming into the pit area.

Id. at 225, 188 N.W.2d at 712.

There was no question in *Hollamon* that the plaintiff knew and appreciated the dangers. He said that he did. That is far removed from the evidence in this case. Here, one witness gives an opinion that from the length of time that Cassio had been diving, he, the witness, would say "yes," Cassio would know the risks of diving alone and holding his breath. This presents a fact question as to a finding of negligence, not assumption of risk. Perhaps testimony that Cassio was a certified diver, that to become certified he would have had to have taken a course in scuba diving, and that the standard instructional course would have required that he be taught the dangers of diving alone and holding his breath while ascending might permit a finding that he did in fact know the danger. However, absent such evidence in the record, there is a real question as to whether there was even a submissible issue as to his knowledge. Certainly the evidence was only sufficient to have permitted a jury to make a factual finding on that basis, which it did.

Creighton's assignment of error regarding the failure of the trial court to find that Cassio was contributorily negligent or assumed the risk as a matter of law is without merit.

PRESENT WORTH INSTRUCTION

In its motion for a new trial, Creighton contended that the trial court erred in failing to include within its instruction to the jury the present worth tables found as part of NJI 4.13. The court's instruction on damages did require the jury to reduce any verdict to its present worth and included in that instruction the first two paragraphs of NJI 4.13. However, it did not include the examples of calculation or the present worth table itself.

Creighton cites us to rule (a), adopted by this court on November 20, 1968, of the Nebraska Jury Instructions, which states:

> Whenever Nebraska Jury Instructions (NJI) contains an instruction applicable in a Civil or Criminal Case, and the Court, giving due consideration to the facts and the prevailing law, determines that the jury should be instructed on the subject, the Nebraska Jury Instruction shall be used.

In *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979), this court reversed a judgment of the district court because the trial court gave its own instruction concerning gross negligence rather than the one contained in Nebraska Jury Instructions. In doing so, this court referred to rule (a) and added: "Whenever applicable and practicable, Nebraska Jury Instructions (NJI) are to be used when charging the jury . . . ." *Id.* at 261, 278 N.W.2d at 580.

In a later case, *Enyeart v. Swartz*, 218 Neb. 425, 355 N.W.2d 786 (1984), the district court was reversed and a new trial granted because the trial court did not follow the Nebraska Jury Instructions fully in giving its instructions, nor did it instruct on proximate cause. The court stated:

> Although neither party raised any objection at the time of the instruction conference and appellant does not assign it as one of his errors, an examination of the instructions tendered by the court to the jury discloses that the court did not provide the jury with an instruction on the definition of "proximate cause" as required by NJI 3.41. No such instruction was given even though this was a case in which the issue of the proximate cause of the accident was vigorously disputed. . . . While it may not be error, per se, to fail to give a definition of proximate cause as set out in NJI 3.41 if the matter is not an issue [citation omitted], the failure to give an instruction on the definition of proximate cause where, as here, it is one of the principal issues in the case must be considered by the court to be plain error, requiring reversal.

Enyeart v. Swartz, supra at 426-27, 355 N.W.2d at 788.

The trial court here gave as its reason for not including the present worth tables the following explanation:

> The court has given 4.13 in essence, but has not included examples of the table. It is my feeling that the inclusion of

> those materials are [sic] confusing to a jury, and would not serve the ultimate purpose of this trial, which is to seek the truth, because I don't think confusion leads to truth. With that in mind, the Court overrules the objection to the instruction and declines to include the examples and/or the table in the instruction.

We examine the instruction given to determine whether it is a correct statement of the law. *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989). It is not error to refuse to give a requested instruction if the substance of the request is in the instruction actually given. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989); *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988). In order to establish as error the trial court's refusal to give a tendered instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction *is a correct statement of the law*, and that the instruction is applicable to the evidence in the case. *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989); *Zeeb v. Delicious Foods, supra*.

The law as reflected by Nebraska's general rule is that an award for future damages must be reduced to its present worth. *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972); *Abbott v. Northwestern Bell Tel. Co.*, 197 Neb. 11, 246 N.W.2d 647 (1976).

The instruction given by the trial court was a correct statement of the law. The suggested examples and the present worth table found at NJI 4.13 of the 1969 edition of Nebraska Jury Instructions are not a statement of the law. The trial court did not err in refusing Creighton's request, and it should not have granted a new trial on that basis.

OPINION TESTIMONY BY LAY WITNESSES

Finally, we deal with Creighton's complaint that Ralph Johnson was permitted to testify that the cause of Cassio's death was cerebral anoxia. Johnson was no more qualified to state an opinion in this regard than any other scuba diver who knows that death may occur from drowning after hyperventilation or from an air embolism following a too rapid

ascent to the surface of the water after having taken in quantities of compressed air. The opinion was not based on what the witness knew because of his experience and education, but on what he had been told. It was based primarily upon the autopsy report of Dr. Jerry Jones, who gave as his opinion that Cassio was hyperventilating and lost consciousness and thereby drowned. Johnson had no qualifications within the meaning of Neb. Rev. Stat. § 27-702 (Reissue 1985) to offer an opinion as to the cause of death. His testimony was pure speculation and should not have been received. *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983).

Dr. Claude Zanetti, who specialized in internal medicine and in the subspecialty of pulmonary diseases with specialized training in treating scuba diving accident victims, testified that the cause of death was an arterial gas embolism.

The cause of death in this instance was extremely important because it relates to proximate cause; i.e., if death was due to drowning, there was evidence from which a jury could find that properly trained lifeguards on duty could have saved Cassio's life. On the other hand, if death was due to an air or gas embolism, there was probably nothing Creighton could have done to have prevented the accident short of prohibiting Cassio from entering the pool.

Due to the importance of the cause of death, permitting an unqualified witness to express an opinion on that subject constituted prejudicial error.

Although we disagree as to the basis, we agree with the trial court that a new trial was required, and therefore the judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

CITY OF WOOD RIVER, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. GEER-MELKUS CONSTRUCTION COMPANY, INC., ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS AND CROSS-APPELLEES, GEO. A. HORMEL & COMPANY, A CORPORATION, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

444 N.W.2d 305

Filed August 11, 1989. No. 87-559.

1. **Trial: Judgments: Limitations of Actions: Final Orders.** The special bifurcation of a trial pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1985) does not create a separate judgment when the trial court determines the action is not barred by the statute of limitations. Interlocutory orders may be modified at subsequent terms provided the court still has not rendered a final decision in matters still pending.
2. **Pleadings: Actions.** Even if a pleading mistakenly identifies a cause of action, the right to recover under the facts alleged is not affected.
3. **Limitations of Actions.** Statutes of repose do not start to run until the cause of action has accrued. A cause of action has not accrued on an indemnity action until the indemnity claimant suffers loss or damage.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with direction.

John A. Wolf, of Shamberg, Wolf & Bush, for appellants.

Richard L. Spangler, Jr., of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellee Hormel.

William A. Francis, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, and O. Wm. VonSeggern, of Grimminger & VonSeggern, for appellee City.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

WITTHOFF, D.J.

This is an appeal from an order of the Hall County District Court finding the third-party action of Geer-Melkus Construction Company, Inc., and United States Fidelity & Guarantee Company (Geer-Melkus) against Geo. A. Hormel & Company (Hormel) was barred by the statute of limitations.

FACTS

Appellant Geer-Melkus contracted with the City of Wood

River to construct a waste water treatment facility. Appellee Hormel manufactured and supplied the rotating media aeration system for the facility. The media system was delivered on or about September 14, 1976, and the plant became operational in the summer of 1977. In the following years, many repairs were made to the media system, and in December 1982 the system broke down completely and could not be repaired.

Wood River filed an action for breach of contract against Geer-Melkus on July 6, 1981. With the court's consent, on December 22, 1981, Geer-Melkus filed a third-party complaint against Hormel, alleging that if it was found liable to Wood River, Hormel was liable to it for breach of warranty.

Specifically, Geer-Melkus complained (1) Hormel warranted the rotating media aeration system would, without further modification, provide a minimum of 22,000 square feet of biological support media in each of the first two stages and 33,000 square feet in the final two stages, for a total of 110,000 square feet of biological support media; (2) Geer-Melkus installed the waste water treatment facility in exact accordance with the plans and specifications; (3) the waste water treatment facility was made operational on or about July 27, 1977; (4) the media rotary disk unit deteriorated and shifted on its shaft; (5) the deterioration and shifting subsequently caused damage to the bearings of the shaft and the shaft itself; (6) the shifting and deterioration required Wood River to replace portions of the waste water treatment system; and (7) the deterioration and shifting were contrary to the specifications for the fixed media rotating disk unit. Geer-Melkus attached, and incorporated by reference, a copy of Wood River's petition as an exhibit to their third-party complaint, and alleged that

> if the allegations of the Plaintiff's Petition are found to be true and if the Plaintiff recovers a judgment against the Defendants and Third Party Plaintiffs, the Third Party Defendant would be liable to the Defendants and Third Party Plaintiffs for the entire amount of the Plaintiffs [sic] claim against them for the reason that said allegations constitute a breach of the Third Party Defendant's express warranty set forth in paragraph 8 hereof.

On February 12, 1982, Hormel filed a demurrer, based primarily upon the statute of limitations defense, which the court overruled. Hormel filed an answer to the third-party complaint on March 5, 1982, admitting it manufactured and supplied the rotating system and stating the system was delivered on February 12, 1978. Hormel raised as affirmative defenses that (1) the action was barred by the statute of limitations; (2) the amount of the claim exceeded the coverage of the warranty; (3) Wood River failed to properly operate and maintain the system; (4) Hormel was not notified of the alleged breach of warranty; and (5) the warranty expired on February 12, 1978. Geer-Melkus filed a reply, alleging the statute of limitations had not run because they were asking for indemnity.

Hormel then moved for summary judgment, once again asserting the statute of limitations. The motion for summary judgment was overruled.

On November 12, 1985, a separate trial was held on the issue of the statute of limitations. At trial, Hormel demurred ore tenus, which demurrer the court also overruled. At the conclusion of this trial, the judge ruled the statute of limitations was tolled because of repairs and replacements made by Hormel.

Trial on the merits was held on October 28, 1986. The court found for Wood River and against Geer-Melkus in the amount of $57,379.54 on the original petition. On the third-party petition, the court found for Hormel and against Geer-Melkus, holding that the third-party action was barred by the statute of limitations. Pursuant to statute, the court allowed attorney fees of $19,000 to Wood River against Geer-Melkus. Geer-Melkus appeals the court's ruling on their third-party complaint, and Hormel cross-appeals the earlier failures to dismiss the action.

ASSIGNMENTS OF ERROR ON APPEAL

Geer-Melkus assigns as error (1) the trial court's failure to direct a verdict in favor of Geer-Melkus and against Hormel at the close of the evidence; (2) the trial court's entry of judgment generally in favor of Hormel and against Geer-Melkus; (3) the trial court's failure to enter judgment against Hormel on the theory of indemnity; (4) the trial court's finding, after the trial

on the merits, that Geer-Melkus' claim was barred by Neb. U.C.C. § 2-725 (Reissue 1980), and reversing its previous finding in favor of Geer-Melkus following a separate trial on the issue of the statute of limitations; and (5) the trial court's failure to determine Neb. Rev. Stat. § 25-224(3) (Reissue 1985) applied to Geer-Melkus' claim.

On cross-appeal, Hormel claims the trial court erred (1) in overruling Hormel's demurrer and (2) in denying Hormel's demurrer ore tenus and admitting evidence at trial on the nature of the statute of limitations issue, over Hormel's objection.

LOSS OF JURISDICTION BY THE DISTRICT COURT TO MODIFY ITS OWN ORDERS

The term of court ended after the trial on the statute of limitations and the court's ruling against Hormel. Geer-Melkus claims the court was therefore without authority to modify this ruling after the trial on the merits.

This court has previously stated that a Neb. Rev. Stat. § 25-221 (Reissue 1985) statute of limitations determination is an interlocutory order which is not subject to appeal. *Wulf v. Farm Bureau Ins. Co.*, 188 Neb. 258, 196 N.W.2d 164 (1972).

Wulf dealt with an appeal from a § 25-221 statute of limitations decision prior to the resolution of the remaining issues. The appellee moved to dismiss the appeal based on the fact that a final judgment or determination of the case had not been entered. The motion was sustained.

> [I]t seems clear that section 25-221, R.S. Supp., 1971, intends that an order entered denying relief on a plea of the statute of limitations is to be treated as an interlocutory order and that any error in the ruling made may be presented in an appeal taken after final disposition of the case. It is in the same relative position as is faced when the court overrules a demurrer, a plea in abatement, a motion to amend, or a motion to dismiss.

Id. at 260, 196 N.W.2d at 165-66.

The special bifurcation of the trial does not create a separate judgment when the trial court determines the action is not barred by the statute of limitations. Nebraska law generally does not distinguish between types of interlocutory orders for

purposes of appeal or jurisdiction.

> In *Huffman v. Rhodes,* 72 Neb. 57 [100 N.W. 159 (1906)], it was held that an interlocutory order may be vacated at a subsequent term by the same court, without compliance with the provisions of section 602 of the code [Ann. Stat. §§ 1612 et seq. (1903)]. No special procedure therefor is required on the part of the trial court in dealing with such orders, and unless an abuse of discretion is shown the reviewing court will not interfere . . . .

Godfrey v. Cunningham, 77 Neb. 462, 465, 109 N.W. 765, 766 (1906). The statutes at issue in *Godfrey* deal with procedures for appeal and vacation of judgments. There was no motion before the trial court at the end of the term, and the issue of the modification of the interlocutory order was raised entirely in the subsequent term. The result in *Godfrey* is consistent with the inherent power of the court to control its own proceedings and the policy favoring appeal only at the end of all lower court proceedings. Further, this court has stated: "No court is required to persist in error, and, if he concludes that a former ruling was wrong, he may correct it at any time while the case is still in his control." *Tady v. Warta,* 111 Neb. 521, 526, 196 N.W. 901, 903 (1924).

In conclusion, the district court had jurisdiction to modify its earlier orders on the statute of limitations issue.

ISSUE OF INDEMNITY RAISED BY THE PLEADINGS

Before we can determine whether the statute of limitations bars Geer-Melkus' third-party claim, we must determine whether Geer-Melkus seeks damages on a breach of warranty or seeks indemnification. Geer-Melkus does not specifically ask for "indemnity," but, instead, asks for damages for breach of warranty. The third-party complaint specifically set forth the problems with the "rotating media aeration system" manufactured by Hormel. It incorporated Wood River's petition and all its allegations. Finally, the third-party complaint alleged that if Wood River recovered a judgment against Geer-Melkus, Hormel would be liable to Geer-Melkus for the entire amount of Wood River's claim because of the expressed warranty.

While the term "indemnity" is not specifically used,

> [t]he essential character of a cause of action or the remedy or relief it seeks, as shown by the allegations of the complaint, determines whether a particular action is one at law or in equity, unaffected by conclusions of the pleader or what the pleader calls it, or the prayer for relief.

Waite v. Samson Dev. Co., 217 Neb. 403, 408, 348 N.W.2d 883, 887 (1984); *Brchan v. The Crete Mills*, 155 Neb. 505, 52 N.W.2d 333 (1952).

Even if the pleading mistakenly identifies a cause of action, the right to recover under the facts alleged is not affected.

> In order to decide the form of the redress, whether contract or tort, it is necessary to know the source or origin of the duty or the nature of the grievance. Attention must be given to the cause of the complaint; in other words, the character of the action must be determined from what is asserted concerning it in the petition in the cause. It is not important what the plaintiff calls his action. If he does attempt to identify it and is mistaken, that is immaterial. This is the rationale of the code provision that a petition is a statement of facts constituting a cause of action in ordinary and concise language.

Fuchs v. Parsons Constr. Co., 166 Neb. 188, 192, 88 N.W.2d 648, 651 (1958).

It is evident from the pleadings Geer-Melkus claims that (1) appellant Geer-Melkus purchased the rotary system from Hormel; (2) Hormel manufactured the same to meet certain specifications; (3) the system did not meet those specifications; and (4) if Geer-Melkus suffered damages because of the failure of Hormel to fulfill its contractual obligation, they would look to Hormel for payment of their loss. The third-party complaint sets out specifically what Hormel's aeration system did wrong. A duty to indemnify will always arise out of another more basic obligation whether it arises on contract or tort. Although Utah chose to bring sales indemnification actions within § 2-725 of the Uniform Commercial Code, the Utah Supreme Court identified an allegation of a breach of warranty as raising the issue of indemnification.

> Perry argues that [§ 2-725] does not apply because his action is in reality one for indemnity, not one for breach of warranty. We consider this argument in the context of the undeniable fact that the subject matter of this entire lawsuit is the sale of goods, which will be governed where applicable by the Utah version of the Uniform Commercial Code. . . . *The underlying action was for breach of contract, and the amended third-party complaint alleges only a cause of action for breach of warranty. It nowhere mentions indemnity. Nonetheless, we look to the substance of Perry's claim, regardless of what he chose to call it.*

(Emphasis supplied.) *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 217 (Utah 1984).

Hormel cannot claim that it did not understand the theory upon which the third-party complaint was predicated or that it had no warning in time to defend itself. The motion for leave to file a third-party complaint against Hormel specifically stated that "a rotating media aeration system manufactured by George A. Hormel & Co. was defective and was not merchantable and if such allegations are true these Defendants would be entitled to indemnification from George A. Hormel & Co."

In addition thereto, the reply filed by Geer-Melkus specifically addressed § 2-725 and alleged that it did not apply

> for the reason that under the substantive law of the State of Nebraska the periods of limitation set forth in the foregoing statutes, if applicable in the instant case, do not start to run upon a claim for indemnity until such time as the indemnitee's liability has been fixed and discharged.

Therefore, the third-party complaint raised an indemnification cause of action.

APPLICABILITY OF § 2-725 TO INDEMNIFICATION CAUSES OF ACTION

All parties agree the sale which is the subject matter of the third-party complaint is a sale of goods within the meaning of the Uniform Commercial Code. As such, the original contract and warranty were covered by the statute of limitations of

contracts for sale.

In examining the statute and the proposed scope of the statute, it should be noted that any action for breach of contract must be commenced within 4 years after the cause of action has accrued. The statute further specifically defines accrual of a cause of action by saying that the breach occurs when a tender of delivery is made, except where a warranty specifically extends to future performance of the goods, and discovery of the breach must await time of such performance. In this case the warranty did not specifically extend to future performance.

We have not previously addressed the question of whether the limitation set out in § 2-725 applies to an indemnity claim. Other jurisdictions have split on the issue.

Georgia, Utah, Illinois, and Idaho have held indemnity claims are controlled and limited by § 2-725. *PPG Industries v. Genson*, 135 Ga. App. 248, 217 S.E.2d 479 (1975); *Perry v. Pioneer Wholesale Supply Co., supra*; *Anixter Bros, Inc. v. Cen. Steel & Wire*, 123 Ill. App. 3d 947, 463 N.E.2d 913 (1984); *Farmers Nat. Bank v. Wickham Pipeline*, 114 Idaho 565, 759 P.2d 71 (1988). These jurisdictions view the strict application of § 2-725 as necessary to avoid the problem of unending litigation.

> The four-year statute applicable to the indemnity theory does not apply in this case because a sale of goods occurred in 1974 with observable defects (if any), and any cause of action against Third-Party Defendants arose at that time. Otherwise, anyone buying defective goods could resell them before or after the statute had run, and upon being sued for the original defects, file a third-party complaint for indemnity and thus defeat the policy of repose underlying the statute of limitation.

Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 217 n.1 (Utah 1984).

Maryland, New Hampshire, Missouri, Maine, North Carolina, and New York have ruled indemnity claims do not come under the time limitation found in § 2-725. *McDermott v. City of N. Y.*, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980); *Walker Mfg. Co. v. Dickerson, Inc.*, 619 F.2d 305 (4th Cir. 1980) (applying North Carolina law); *Cyr v. Michaud*, 454

A.2d 1376 (Me. 1983); *City of Clayton v. Grumman Emer. Prod.*, 576 F. Supp. 1122 (E.D. Mo. 1983) (applying Missouri law); *Jaswell Drill Corp. v. General Motors Corp.*, 129 N.H. 341, 529 A.2d 875 (1987); *Hanscome v. Perry*, 75 Md. App. 605, 542 A.2d 421 (1988). These jurisdictions follow the reasoning advanced by the New York Court of Appeals in *McDermott v. City of N. Y., supra* at 216-17, 406 N.E.2d at 462, 428 N.Y.S.2d at 646:

> Conceptually, implied indemnity finds its roots in the principles of equity. It is nothing short of simple fairness to recognize that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity" (Restatement, Restitution, § 76). To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs (see, e.g., *Dunn v. Uvalde Asphalt Paving Co.*, 175 NY 214, 217-218; *Oceanic S. N. Co. v. Compania Transatlantica Espanola*, 134 NY 461, 465-468 . . .).

In deciding the statute of limitations question was governed by the indemnity rule rather than the contract or warranty rule, the Maryland Court of Special Appeals stated:

> In approaching this issue, both sides have focused their attention on when limitations begins to run in an action for indemnification and have given but scant consideration to the nature of the indemnity claim actually made by appellant. As to the limitations question, we think that appellant is correct in her view that an action for indemnification accrues and the limitations period commences not at the time of the underlying transaction but when the would-be indemnitee pays the judgment arising from the underlying transaction. That seems to be the majority view, and it is certainly in keeping with the nature of an indemnity action.

(Citations omitted.) *Hanscome v. Perry, supra* at 614, 542 A.2d at 425.

In applying the Missouri rule, the U.S. District Court used the same rationale. In *City of Clayton v. Grumman Emer.*

Prod., supra, the issue was which party was financially responsible for cracks in a firetruck frame. The firetruck was purchased by the city from Howe Fire Apparatus Co., Inc., which was subsequently merged into Grumman Emergency Products, Inc. The frame was manufactured by The Warner and Swayse Company. Clayton sued Grumman as the successor in interest to Howe, which brought in Warner and Swayse as third-party defendants. Warner and Swayse responded by pleading the statute of limitations.

> Although Grumman raises the issue of the future performance exception to § 2-725, the Court need not address that question. Counts I and III of Grumman's third-party complaint state causes of action for indemnity based on breaches of express and implied warranties. The statute of limitations for indemnity does not start to run until the indemnitee is found liable to a third party. *See Simon v. Kansas City Rug Co.*, 460 S.W.2d 596, 600 (Mo.1970). Therefore, Grumman's claims for indemnity from Warner are not time barred. This result does not imprudently enlarge the statute of limitations for breach of warranty. A party who buys and then resells a product is not in a position to discover the latent defect within the warranty's limitation period because the product is in the hands of the consumer during that time. Only when the consumer sues the retailer does the retailer gain notice of the latent defect. *See Walker Manufacturing Co. v. Dickerson, Inc.*, 619 F.2d 305, 310 (4th Cir.1980) (North Carolina U.C.C. law).

City of Clayton, supra at 1127.

Nebraska has long held a claim for indemnity accrues at the time the indemnity claimant suffers loss or damage. *City of Lincoln v. First Nat. Bank of Lincoln*, 67 Neb. 401, 93 N.W. 698 (1903).

In *Waldinger Co. v. P & Z Co., Inc.*, 414 F. Supp. 59 (D. Neb. 1976), the trial court held the underlying statute of limitations dealing with political subdivision tort claims did not apply to actions seeking contribution or indemnification. Waldinger Co. instituted an action on January 16, 1976, against P & Z, Metropolitan Utilities District of Omaha, and the City of

Omaha, alleging negligence proximately resulting in the collapse of a slurry trench wall which surrounded the Omaha-Douglas Civic Center. On May 3, 1976, the City of Omaha filed a third-party complaint against Hawkins Construction Company, Leo A. Daly Company, and Omaha-Douglas Public Commission for indemnification or contribution. Thereafter, the commission moved to dismiss the third-party complaint for failure to file a tort claim pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2401 et seq. (Reissue 1974). The commission argued that any claims not filed within 1 year of the injury were extinguished.

In interpreting Nebraska law on contribution and indemnity, the trial court held:

> These decisions are based on sound equitable principles. Contribution and indemnification are inchoate rights which do not arise until one tort feasor has paid more than his share of the damages or judgment. A plaintiff may sue one tort feasor or he may join all tort feasors in one suit. He may also wait more than a year to file his suit. To accept the Commission's argument that the claim for contribution or indemnification arises when the injury is incurred would allow plaintiff to choose which defendant would bear the burden by simply filing his lawsuit after the one year statute of limitations has run. The defendant joint tort feasor, having no prior knowledge of a claim, would be unable to file a claim prior to being joined in the lawsuit.

Waldinger Co. v. P & Z Co., Inc., supra at 60.

The reasoning in *McDermott*, *Hanscome*, and *City of Clayton* is consistent with Nebraska law. If we were to adopt the opposite position, a party who might have a claim for indemnification would have to bring his action before the underlying claim was brought to avoid the running of the statute of limitations. Therefore, we hold § 2-725 does not apply where a party is seeking indemnification.

The present case is a classic example of the inequity which would result from adopting the theory advanced by Hormel. Geer-Melkus could not have brought their cause of action for

indemnity until the original suit was brought by Wood River on July 6, 1981. The statute of limitations on the indemnity action would have expired on December 14, 1980. Geer-Melkus would be left with no recourse under these circumstances.

It is generally recognized that the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed. Therefore, it should recover from another. See, *Danny's Const. Co., Inc. v. Havens Steel Co.*, 437 F. Supp. 91 (D. Neb. 1977); *Barber-Greene Company v. Bruning Company*, 357 F.2d 31 (8th Cir. 1966); *Farmers Elevator Mut. Ins. Co. v. American Mut. Lia. Ins. Co.*, 185 Neb. 4, 173 N.W.2d 378 (1969). In this case, the product was manufactured and sold by Hormel. The evidence in the record indicates any problems with the product were directly attributable to Hormel, not to Geer-Melkus.

The trial court found that the statute of limitations question was resolved by *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). This action was to recover damages arising from a leaky roof installed upon a junior high school. The school district sued the general contractor, the architect, the subcontractors, and various and sundry bonding companies. One of the defendants was dismissed on a demurrer and the others on motions for summary judgment, on the basis that the various statutes of limitations had run. Because none of the defendants were liable, there was no issue of indemnity.

Geer-Melkus asserts the proper statute governing limitation of this action is Neb. Rev. Sat. § 25-224 (Reissue 1985). In the event § 25-224 were deemed applicable, subsection (3) removes the limitation on indemnity claims. We therefore need not address the question of whether the third-party complaint comes within § 25-224.

For the foregoing reasons, we find the statute of limitations does not bar the third-party complaint brought by Geer-Melkus.

CONCLUSION

The trial court's findings that the pleadings and evidence establish that Geer-Melkus Construction Company, Inc., and

United States Fidelity & Guarantee Company's claim was for a breach of warranty and not for a claim of indemnification and that the claim was barred by the statute of limitations, § 2-725, are reversed. As noted above, the uncontroverted evidence establishes that the loss was directly attributable to Hormel. The action is therefore remanded with instruction to enter judgment against Hormel.

REVERSED AND REMANDED WITH DIRECTION.

PUMP & PANTRY, INC., AND BOSSELMAN, INC., APPELLEES, V. CITY OF GRAND ISLAND, APPELLANT, NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE, WYMODAK, INC., A CORPORATION, DOING BUSINESS AS 7-ELEVEN STORE #712, ET AL., INTERVENORS-APPELLEES.

444 N.W.2d 312

Filed August 11, 1989. No. 87-1033.

1. **Declaratory Judgments.** A suit for declaratory judgment is an action sui generis and may involve questions of both law and equity.
2. _____. A declaratory judgment action to construe a statute presents a question of law.
3. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
4. **Statutes: Legislature: Intent.** One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question.
5. _____: _____: _____. When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
6. **Statutes: Legislature: Intent: Liquor Licenses.** The language of Neb. Rev. Stat. §§ 53-135 (Reissue 1984) and 53-150 (Reissue 1988) discloses a legislative intent to codify a practice of approving an application for continuation of an existing liquor license in the absence of a change of circumstances indicated on the licensee's renewal application.
7. **Statutes: Liquor Licenses.** As the result of the renewal privilege established by Neb. Rev. Stat. § 53-150 (Reissue 1988), a licensee is entitled to renewal of a

liquor license, that is, continuation of an existing license, if at the time for renewal the licensee meets the requirements which existed when the license to be renewed was initially issued.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Charles J. Cuypers, Assistant Grand Island City Attorney, for appellant.

Howard E. Tracy, of The Legal Professional Corporation of Howard E. Tracy, for appellees Pump & Pantry, Inc., and Bosselman, Inc.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee Nebraska Liquor Control Commission.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Pump & Pantry, Inc. (Pump & Pantry), and Bosselman, Inc. (Bosselman), both licensed liquor retailers in Grand Island, Nebraska, brought a declaratory judgment action in the district court for Lancaster County against the Nebraska Liquor Control Commission (commission) and the City of Grand Island (city). In their action, Pump & Pantry and Bosselman sought a declaration that the provisions of the Nebraska Liquor Control Act authorized and required only a limited inquiry for renewal of a liquor license. Wymodak, Inc., Ted G. and Dorothy M. Schroeder, and Gas 'N Shop, Inc., intervened in the action and sought the same relief requested by Pump & Pantry and Bosselman. On April 3, 1987, the district court granted summary judgment to Pump & Pantry and Bosselman, declaring that a liquor licensee was entitled to renewal of a license when (1) the applicant demonstrated compliance with the requirements for issuance of a license as such license requirements existed when the applicant first received a license; (2) the premises sought to be licensed are the same as the premises covered by the initially issued license; and (3) the premises are suitable for "such purpose."

The city appeals and contends that the district court

incorrectly construed the statutes in question.

The facts are not in dispute. Pump & Pantry was granted an off-sale, beer only liquor license in 1971 and, after issuance of the initial license, has been issued a renewal license in every year before commencement of the declaratory judgment action in October 1986. Bosselman, Wymodak, and Schroeders were issued similar licenses, contrary to the city's recommendation against issuance of the licenses in 1986. Gas 'N Shop was granted a package liquor license in 1985, which was renewed in 1986. None of the licensees have been charged with violation of the Nebraska Liquor Control Act.

In October 1986, the city requested that the commission require a licensed retailer to submit a "long-form" application for renewal of an existing license. Anticipating enforcement of the city's ordinances prohibiting issuance of a license to "any business or establishment engaged principally in the sale of goods, wares, or merchandise other than alcoholic liquor" and requiring premises where alcohol is sold to be "separate and distinct from any other business activity," Pump & Pantry and Bosselman brought their declaratory judgment action on October 17, 1986. The licensees in the present case apparently feared that the city would recommend denial of their licenses, which recommendations, at that time, were purportedly binding on the commission.

In *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988), an ordinance of the city of Lincoln, Nebraska, which was an ordinance substantially similar to the ordinance in the present case, was declared unconstitutional on equal protection grounds. On December 2, 1988, this court issued its opinion in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), wherein 1986 Neb. Laws, L.B. 911, which gave local governing bodies the authority to make binding recommendations to the commission, was declared unconstitutional in its entirety. In May 1989, the Legislature enacted 1989 Neb. Laws, L.B. 780 and L.B. 781, which gave local governing bodies power, dependent on specified criteria, to make binding recommendations to the commission regarding issuance of a liquor license.

"A suit for declaratory judgment is an action sui generis and

may involve questions of both law and equity." *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 194-95, 318 N.W.2d 70, 72 (1982). A declaratory judgment action to construe a statute presents a question of law. In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *County of York v. Johnson*, 230 Neb. 403, 432 N.W.2d 215 (1988).

At issue in this case is certain language in Neb. Rev. Stat. §§ 53-150 (Reissue 1988) and 53-135 (Reissue 1984).

Section 53-150 provides:

> Any licensee may *renew* his license at the expiration thereof in the manner set forth in section 53-135; *Provided*, he is then qualified to receive a license and the premises for which such renewal license is sought are the same premises under the license to be renewed and are suitable for such purpose; *and provided further*, that the *renewal privilege* herein provided for shall not be construed as a vested right which shall in any case prevent the commission from decreasing the number of licenses to be issued within its jurisdiction.

(Emphasis supplied.)

In reference to the licensees involved in this appeal, the commission had not taken any action "decreasing the number of licenses to be issued within its jurisdiction."

Section 53-135, at the time of the declaratory judgment involved in these proceedings, provided in part:

> A retail or bottle club license issued by the commission and outstanding may be *automatically renewed* by the commission without formal application if the commission has on file a bond as required by section 53-138.02, upon payment of the state registration fee, and license fee if payable to the commission. The registration fee for license renewals may be paid by a personal or business check. The payment thereof shall be an affirmative representation and certification by the licensee that all answers contained in an application, if submitted, would be the same in all material respects as the answers contained in the last previous application. The commission may at any time

> require a licensee to submit an application and the commission shall at any time require a licensee to submit an application if requested in writing to do so by the local governing body.

(Emphasis supplied.)

The sole issue presented by this appeal concerns the requirements which a liquor licensee must satisfy before a license is renewed pursuant to §§ 53-135 and 53-150. Pump & Pantry and Bosselman claim that the statutes in question permit only a limited inquiry for renewal of a liquor license, that is, an inquiry whether the renewal applicant has satisfied the license requirements existing when a liquor license was initially issued to the licensee. The city, on the other hand, maintains that requirements for issuance of a liquor license might change after initial issuance of a license, and, as a result of the subsequent change in requirements for a license, a renewal applicant must meet the current statutory standards for issuance of a renewal license. The district court concluded that the limited inquiry suggested by the licensees in this case was the proper construction and application of §§ 53-135 and 53-150.

"One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. [Citation omitted.] To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Spence v. Terry*, 215 Neb. 810, 814-15, 340 N.W.2d 884, 886-87 (1983).

> To determine legislative intent we generally consider the subject matter of the whole act, as well as the particular topic of a statute containing the questioned language. [Citation omitted.] In judicial construction of a statute, the statutory language will be given its ordinary and popular meaning, and a statute is open to construction only if the statute is ambiguous.

Anderson v. Peterson, 221 Neb. 149, 154, 375 N.W.2d 901, 905 (1985). See, also, *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

"When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to

determine the intent of the Legislature, so that different provisions of the act are consistent and sensible." *In re Application U-2*, 226 Neb. 594, 610-11, 413 N.W.2d 290, 301 (1987).

There are acceptable, ordinary, and popular meanings attributed to *renew* and *privilege* as those words are used in § 53-150 and *automatically* as used in § 53-135. *Automatic* means "having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in operation." Webster's Third New International Dictionary, Unabridged 148 (1981). *Privilege* means "a right or immunity granted as a peculiar benefit, advantage, or favor." *Id.* at 1805. *Renew* means "to grant or obtain an extension of: continue in force for a fresh period." *Id.* at 1922. Thus, the phrase "renewal privilege," as those words are used in § 53-150, means a right or benefit granted in favor of a licensee seeking an extension or continuation of a previously issued license. Moreover, in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), we determined that a right-privilege dichotomy was no longer useful in reference to an issued liquor license and held that the holder of a liquor license has a constitutionally protected interest in obtaining renewal of an existing license.

Further, the official "Explanation" contained in the legislative history of 1959 Neb. Laws, L.B. 487, which established the renewal privilege existing today, contains the following:

> Although the license renewal feature of the bill constitutes the most extensive change from the existing Act, when we look through form to the substance it is readily perceived that the end result as to which licenses will be renewed will remain virtually unaffected. It is a fact that under the present law renewal applications which indicate no change in circumstances affecting the license are approved as a matter of course, after passing them through the ritualized procedures. As a practical matter, it is only where the application of the licensee discloses altered circumstances that the exercise of judgment is required.

The city claims that the legislatively established "renewal

privilege," expressed in § 53-150, merely allows an existing license holder to reapply for a new license, which will be granted if the renewal applicant demonstrates compliance with the licensure requirements governing a current first-time applicant. In reaching this conclusion, the city relies heavily on the language of § 53-150, which provides that a licensee may renew a liquor license provided "he is then qualified to receive a license." The city's interpretation of § 53-150 would nullify the "renewal privilege" established by § 53-150 and would place renewal applicants on the same footing with first-time applicants for a liquor license. We conclude that the result suggested by the city was not intended by the Legislature when it enacted § 53-150. Rather, we conclude that the legislative history and the language of §§ 53-135 and 53-150 disclose a legislative intent to codify a practice of approving an application for continuation of an existing liquor license in the absence of a change of circumstances indicated on the licensee's renewal application. Hence, §§ 53-135 and 53-150 establish a privilege or limited right of renewal pertaining to an existing liquor license. *Bosselman, Inc. v. State, supra.*

We therefore construe that part of § 53-150 which specifies that a renewal applicant must be "then qualified to receive a license" to mean that the licensee-applicant must meet the requirements of Neb. Rev. Stat. § 53-125 (Reissue 1988), which provides that "[n]o license of any kind shall be issued to" certain classes of applicants, such as convicted felons and certain convicted misdemeanants. An event occurring after the issuance of the initial license, such as the licensee's conviction for a felony, may disqualify the licensee from renewal of a license because the applicant would no longer be "then qualified to receive a license." However, as the result of the renewal privilege established by § 53-150, a licensee is entitled to renewal of a license, that is, continuation of an existing license, if at the time for renewal the licensee meets the requirements which existed when the license to be renewed was initially issued. Thus, if at the time of the initial licensure a licensee's prior felony conviction disqualified the licensee from receipt of a license, an intervening felony conviction would disqualify the licensee from renewal of an existing license.

Accordingly, we hold that a licensee may renew a liquor license provided (1) "he is then qualified to receive a license"; (2) "the premises for which such renewal license is sought are the same premises" designated in the initial license; and (3) the premises are suitable for the sale of alcoholic beverage in accordance with the initially issued license.

The provisions of § 53-135, requiring payment of the state registration fee and license fee, operate as "an affirmative representation and certification by the licensee that all answers contained in an application, if submitted, would be the same in all material respects as the answers contained in the last previous application." In essence, this "affirmative representation" merely reflects the requirements of § 53-150, but does not require that a renewal applicant satisfy additional requirements for issuance of a renewal license.

Our conclusion regarding the construction of the statutes in question concerning the license renewal privilege under the Nebraska Liquor Control Act is the same as that reached by the district court. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF WALTER SNOVER, DECEASED. WILLIAM G. LINE, PERSONAL REPRESENTATIVE OF THE ESTATE OF WALTER SNOVER, DECEASED, APPELLANT, V. MERRILL SNOVER ET AL., APPELLEES.

443 N.W.2d 894

Filed August 11, 1989. No. 87-1058.

1. **Trial: Final Orders: Appeal and Error.** An order affecting a substantial right, when made in a special proceeding, is a final order and is appealable, even though it does not terminate the action nor constitute a final disposition of the case.
2. **Decedents' Estates: Words and Phrases.** A proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1985) to remove a personal representative for cause is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1985).

3. **Words and Phrases.** A substantial right is an essential legal right as distinguished from a mere technical one.
4. **Decedents' Estates: Pleadings.** Given the scope of the personal representative's power over the beneficiaries' and other interested parties' interests in an estate, the right conferred by Neb. Rev. Stat. § 30-2454 (Reissue 1985) to petition the county court to remove the personal representative for cause is a substantial right.
5. **Decedents' Estates: Appeal and Error.** The Supreme Court reviews probate cases for error appearing on the record.

Appeal from the District Court for Dodge County, ROBERT E. OTTE, Judge, on appeal thereto from the County Court for Dodge County, F.A. GOSSETT, Judge. Judgment of District Court affirmed.

William G. Line, of Kerrigan, Line & Martin, pro se.

Charles H. Wagner, of Edstrom, Bromm, Lindahl & Wagner, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from the district court for Dodge County order reversing the order of the county court for Dodge County and removing appellant, William G. Line, as personal representative of the Walter Snover estate.

On January 10, 1986, Line was appointed personal representative of the Walter Snover estate. On March 11, 1986, appellees beneficiaries Merrill Snover and Dorothy Willnerd filed a petition for supervised administration of the estate. Although the transcript contains no written order, the record shows that supervised administration of the estate was ordered by the county court during a hearing on April 4, 1986. On May 12, 1987, appellees filed a motion to remove Line as personal representative and for the return of estate assets.

After a hearing, appellees' motion was overruled by the county court because "[t]he beneficiaries have failed to prove the delay in the administration of this estate is the fault of the personal representative." Appellees timely appealed to the district court. Line moved to dismiss the appeal for lack of a final order.

On October 2, 1987, the district judge found (1) that the decision of the county court overruling the beneficiaries' motion to remove Line as personal representative was a final appealable order; (2) that there was a valid order entered by the county court on January 23, 1987, with the consent and concurrence of Line, that Line would within 45 days resolve any problems concerning the estate, complete the federal estate tax return, and submit a proposed plan and proposed order of distribution or advise the county court and counsel of any adjustments necessary; (3) that Line failed totally to comply with the January 23 progression order; (4) that Line "failed to file a Federal Estate Tax Return and has failed to pay any tax due, which tax liability now continues to draw interest and penalties"; (5) that Line paid, without prior court approval, attorney fees and personal representative fees, contrary to the order for supervised administration; and (6) that Line breached his duty to the court and to the estate and should be removed. The district court reversed the county court ruling and remanded the cause to the county court with directions to remove Line as personal representative. Line timely appealed to this court.

In this court, Line assigns seven errors, which may be summarized as the district court's errors: (1) in finding that the order of the county court overruling appellees' motion to remove Line as personal representative was a final order which could properly be appealed to the district court; (2) in finding that court approval was necessary to pay attorney fees or personal representative fees or that payment of such fees was contrary to an order for supervised administration; and (3) in removing Line as personal representative absent any error on the record made in the county court. We affirm the action of the district court.

Line first contends that the order of the county court overruling appellees' motion to remove him as personal representative was not a final order appealable to the district court. This question is determinative of the district court's and our jurisdiction over this matter. See, *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989); *In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989); Neb. Rev. Stat.

§ 24-541.01(2) (Cum. Supp. 1988).

The Nebraska Probate Code is set out in Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 1985). Section 30-2217 provides that appellate review under the code is governed by Neb. Rev. Stat. § 30-1601 (Reissue 1985), which, in turn, provides that "[i]n all matters arising under the Nebraska Probate Code, appeals shall be allowed as provided in sections 24-541.01 to 24-541.10 and 24-551." Section 24-541.01(2) provides, "In cases of appeals from . . . proceedings under the Nebraska Probate Code, an appeal may also be taken by any person against whom the final judgment or final order may be made or who may be affected thereby." Neb. Rev. Stat. § 25-1902 (Reissue 1985) defines a final order as "an order affecting a substantial right made in a special proceeding . . . ."

The issue presented in Line's first assignment of error is whether the order of the county court dismissing appellees' motion to remove the personal representative was made in a special proceeding and affected a substantial right.

We have held:

> An order affecting a substantial right, when made in a special proceeding is a final order and is appealable, even though it does not terminate the action, nor constitute a final disposition of the case. A special proceeding may be said to include every special statutory remedy which is not in itself an action.

Sullivan v. Storz, 156 Neb. 177, 180, 55 N.W.2d 499, 502 (1952). See, also, *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980); *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948); *Turpin v. Coates*, 12 Neb. 321, 11 N.W. 300 (1882).

Neb. Rev. Stat. § 25-101 (Reissue 1985) provides that there is "but one form of action, which shall be called a civil action."

> The code [of civil procedure] does not contain a definition of an action or a special proceeding but it does declare that there is but one form of action to be called a civil action, and the procedure for commencing and pursuing it to a final conclusion is prescribed. . . .
>
> Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of

> a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. A special proceeding within the meaning of the statute defining a final order must be one that is not an action and is not and cannot be legally a step in an action as a part of it. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute. A special proceeding may be connected with an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action are [sic] made—as for instance garnishment or attachment—but it is not an integral part of or a step in the action or as it is sometimes referred to in such a situation a part of the "main case."

Rehn v. Bingaman, 157 Neb. 467, 478-79, 59 N.W.2d 614, 620-21 (1953) (Boslaugh, J., concurring).

The Nebraska Probate Code applies to the affairs and estates of decedents. Section 30-2454 confers upon persons interested in an estate the specific right to petition the county court to remove the personal representative for cause at any time. We hold that a proceeding under § 30-2454 to remove a personal representative for cause is a special proceeding within the meaning of § 25-1902.

This court also has stated that "[a] substantial right is an essential legal right as distinguished from a mere technical one." *Sullivan v. Storz, supra* at 180, 55 N.W.2d at 502; *Western Smelting & Refining Co. v. First Nat. Bank, supra*; *Egan v. Bunner*, 155 Neb. 611, 52 N.W.2d 820 (1952). Sections 30-2462 to 30-2482 confer upon the personal representative broad powers to administer and distribute a decedent's estate. Section 30-2465 provides that the personal representative may, in most cases, proceed without adjudication, order, or direction of the county court. Section 30-2464 provides that the personal

representative has a duty to settle and distribute the estate as expeditiously and efficiently as is consistent with the best interests of the estate and must use his authority for the best interests of successors to the estate.

Given the scope of the personal representative's power over the interests of the beneficiaries and other interested parties in an estate, the right conferred by § 30-2454 to petition the county court to remove the personal representative for cause is a substantial right.

In this case, after a hearing on the merits, appellees' motion to remove Line as personal representative was denied by the county court. The order of the county court was made in a special proceeding and affected the substantial rights of the appellees. As such, it was a final order appealable to the district court. Appellant's first assignment of error is without merit.

We determine that this court has jurisdiction and we review this probate case for error appearing on the record. *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989); *In re Estate of Miller*, 231 Neb. 723, 437 N.W.2d 793 (1989).

The record shows that the decedent, Walter Snover, had four children: W. Dale Snover, Clara Anson, and appellees Merrill Snover and Dorothy Willnerd. On January 7, 1981, Walter Snover, Merrill Snover, and Dorothy Willnerd filed a petition seeking protective proceedings under §§ 30-2631 et seq. The petition sought the appointment of a conservator for Walter Snover's affairs and alleged, in part, that appointment of a conservator was necessary because Walter Snover was unable to handle his affairs due to his age and physical condition. The petition prayed that First National Bank & Trust Company of Fremont be appointed conservator of the estate of Walter Snover. On January 22, 1981, however, Walter Snover (apparently with the support of his son Dale) filed an amended petition praying that Donald E. Morrow be appointed conservator of his estate. Line witnessed Walter Snover's signature on the amended petition. Over the objections of Merrill and Dorothy, Morrow was appointed conservator on February 9, 1981. Morrow subsequently retained Line as his counsel in the conservatorship proceedings.

The conservatorship file shows a history of conflict between

Dale, on the one hand, and Merrill and Dorothy, on the other, regarding the administration of their father's estate. These disputes included a sale of land by Morrow to Dale Snover at less than fair market value and the withdrawal of $225,000 from the First National Bank of Hooper and its subsequent reinvestment in a bank in Blair, where Dale Snover did business.

A journal entry dated March 31, 1982, shows that Morrow tendered his resignation "in the interest of the settlement of all disputes between the parties" and that the resignation would take effect when all applications for counsel fees and expenses were determined.

On April 16, 1982, the county court approved a family settlement agreement executed by Merrill, Dorothy, Clara, and Dale. These parties agreed (1) that Merrill, Dorothy, and Clara would not seek to set aside the sale of real property to Dale; (2) that Dale, Dorothy, and Merrill would continue to operate the farms of Walter Snover that "each of them now operates on the basis of an oral lease from year to year"; (3) that any claims and demands existing in favor of Walter Snover against his children, or in favor of the children against their father, or claims and demands among the children, would be treated as satisfied and discharged; and (4) that Line and appellees' attorney, Neil Schilke, would be appointed coconservators of the estate. The agreement also stated that the conservatorship

> proposes to make gifts equally to the families of Dorothy Willnerd, Merrill Snover, and Dale Snover, and to the family of Clara Anson . . . . Such gifts are to be in the amounts sufficient to take maximum advantage of federal gift and estate tax laws and in amounts consistent with the best interest of the protected person.

At this time, Walter Snover, the father of all the parties to the agreement and the owner of all the property involved, apparently was not able to play any role in the disposal of his property.

Morrow filed an application for fees on April 23, 1982, seeking a $5,000 conservator fee and attorney fees to Line's law firm in the amount of $4,289.38. On May 3, Schilke filed an application seeking $2,485.08 in attorney fees for his representation of Merrill and Dorothy in the conservatorship

proceedings. Predictably, a fee dispute followed. The county court eventually authorized fees in the amounts of $4,589.38 to Line's firm, $1,188 to Schilke, and $2,509.45 to Morrow. We note that out of a total of $15,877.38 in attorney fees, $11,289.38 was disbursed to Line's firm during the conservatorship.

Although Morrow's resignation became effective and Line and Schilke were appointed coconservators on July 30, 1982, no acceptance of appointment or letters of coconservatorship were filed until December 9, 1983, and Morrow continued to act as conservator and file reports in the conservatorship. After Merrill and Dorothy objected to Morrow's report of June 11, 1983, the county court appointed an accounting firm to examine the conservator's records. The court's order of September 19 further provided that no further acts be performed by Line, Schilke, or Morrow without the prior approval of the court.

The December 9, 1983, letters of coconservatorship provided, in part, that as coconservators, Line and Schilke "shall not exercise the following powers without prior order of the Court: 1. You shall not pay yourselves as Co-conservators. 2. You shall not pay yourselves attorney's fees. 3. You shall not sell real estate." Line and Schilke administered the estate until Walter Snover's death on December 24, 1985. Their final report was filed January 13, 1986, and Line, as personal representative of the Walter Snover estate, acknowledged receipt of the estate property on that date. On May 18, 1987, Schilke filed an "affidavit and application" in the conservatorship seeking conservator fees.

Walter Snover died on December 24, 1985. His last will and testament, executed February 21, 1980, and a codicil to that will were admitted to probate on January 10, 1986. The codicil, executed October 1, 1981, changed the original designated personal representative and nominated Morrow and Line as copersonal representatives. Although Morrow declined to serve, Line accepted the appointment. The letters of personal representative filed January 10, 1986, authorized Line "to do and perform all acts which may be authorized by law."

Walter Snover's will devised real estate to Merrill, Dale, and

Dorothy. In addition, Dorothy received the balance owed to her father from the sale to her of real property. Dorothy, Merrill, and Clara each received an interest in the balance of a contract for the sale of land to Dale on February 19, 1980. The residue of the estate, listed in the inventory as $40,099.78 in "Mortgages, Notes and Cash," was left to Merrill, Dale, and Dorothy in equal shares.

On March 11, 1986, Merrill and Dorothy filed a petition for supervised administration, alleging that supervised administration was necessary because Line had previously served as counsel for Dale in conjunction with disputes during the conservatorship, that various transactions involving Dale occurred during the conservatorship which should be reviewed or pursued by the personal representative, and that Line had a potential conflict of interest. Line had no objection to supervised administration, and supervised administration was ordered during the April 4, 1986, hearing on the petition. No written order of supervised administration was filed.

On January 8, 1987, Merrill and Dorothy filed a motion for accounting. An accounting filed by Line on January 16, 1987, reflected receipts of $41,862.23 and disbursements of $37,002.23, including $11,622 in attorney fees paid to Kerrigan, Line & Martin and a personal representative fee of $4,649 paid to Line. Line's accounting also stated that "[t]his estate cannot be closed immediately because I am defendant in a civil suit, Paul W. Morris, d/b/a Morris Oil Co. vs. Estate of Walter Snover, in the District Court of Dodge County, Nebraska, being Case No. 28464."

In a journal entry filed January 23, 1987, the county court approved Line's accounting, but ordered that Line resolve any remaining problems concerning closing the estate within 45 days. The order reflects that Line had advised the court that a federal estate tax return could be completed within this time and that Line would prepare a proposed plan and proposed order for distribution. The court further ordered that Line "shall comply with that time schedule or notify the Court and counsel for the beneficiaries of any necessary adjustment in that time schedule in a timely fashion."

On May 12, 1987, appellees filed a motion to remove Line as

personal representative and for the return of estate assets, alleging, in part, (1) that Line had paid personal representative and attorney fees without court approval, notwithstanding the order for supervised administration; (2) that said fees were excessive; (3) that Line failed to comply with the county court's progression order of January 23, 1987, by failing to file a federal estate tax return and failing to submit a proposed plan for distribution; and (4) that Line breached his duty to protect the estate by submitting and failing to contest untimely claims for additional attorney fees incurred during the conservatorship of the decedent. Attached to the motion was a copy of an application for conservator fees filed by Line and Schilke on May 8, 1987, in the conservatorship proceeding.

As an interested person, the trustee in bankruptcy of the estate of Dale Snover filed a "Statement of Support for Motion for Removal of Personal Representative and Return of Estate Assets," joining in the prayer of Merrill and Dorothy to remove Line.

At the May 29, 1987, hearing on the motion to remove, counsel for Merrill and Dorothy informed the court that the federal estate tax return should have been filed within 9 months of the death of Walter Snover, that the return had not been filed, that no extension had been filed, and that interest and penalties against the estate were accruing as a result of Line's failure to resolve the federal estate tax matter.

During the May 29 hearing, the county court also admitted in evidence Line's deposition taken April 10, 1987. During the deposition, Line testified that he had not completed a federal estate tax return, that there was no reason it was not done yet, and that it would be done "probably within the next couple of weeks." At the hearing, Line stated that the federal estate tax would be approximately $35,000 and that since the net estate assets were insufficient to pay the federal estate tax, "the easiest thing would be to just dispose of the land of Merrill and Dorothy," since Dale Snover had declared bankruptcy, and the trustee in bankruptcy claimed Dale's share of the estate. Line further informed the court that the return could be filed, "but we're going to need some contribution . . . as to the federal estate tax . . . ."

The record does not contain a federal estate tax return or notification from Line to the court or counsel regarding the status of the estate or reasons why the estate could not be completed and closed.

Section 30-2454(b) provides that cause for removal of a personal representative exists

> when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

With respect to Line's contention that the district court erred in finding that his payment of attorney and personal representative fees was contrary to an order for supervised administration, § 30-2439 provides:

> A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in this part, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

Section 30-2442 provides:

> Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this code, but he shall not exercise his power to make any distribution of the estate without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

In orally granting appellees' petition for supervised

administration, the county judge ordered only that "[t]he Court will grant the petition and order that the Estate No. 17011, In the Matter of the Estate of Walter Snover, Deceased, be handled by supervised administration." The record does not show that any other restrictions were ordered by the court or endorsed on Line's letters of appointment. Although an order for supervised administration may include a restriction that the personal representative may not pay attorney or personal representative fees without the prior order of the court (see § 30-2450), such relief was not requested in appellees' petition for supervised administration. The lack of appropriate restrictions in connection with Line's supervised administration has caused a substantial part of the problems in this estate. The record shows that Line retained all powers of personal representatives under the probate code except the power to make distributions of the estate without prior order of the court.

Section 30-2476(21) authorizes a personal representative to employ attorneys to assist the personal representative in the performance of his administrative duties. Section 30-2476(18) specifically provides that the personal representative may pay "compensation of the personal representative, and other expenses incident to the administration of the estate." Under § 30-2487(a), costs and expenses of administration have priority over all other claims against the estate. As defined in § 30-2209(11), a "distributee" is any person who receives property of the decedent from the personal representative other than as a creditor or purchaser.

We determine that Line's payments of attorney and personal representative fees were not "distributions" of the estate and that the payment of these fees did not violate the order for supervised administration. See *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988). Whether such payments were appropriate, in view of the heated nature of this probate proceeding, is not for this court to decide. The reasonableness of the compensation paid to Line and his law firm may be reviewed pursuant to § 30-2482. The payment of fees, therefore, did not constitute grounds for removal of the personal representative. The district court's finding to the

contrary was erroneous.

We do determine, however, that Line's inactivity with respect to the federal estate tax return and failure to provide a proposed plan and proposed order for distribution clearly violated the county court's progression order of January 23, 1987, and was not in the best interests of the estate. Where the county court had ordered a certain progression, such unexplained inactivity by the personal representative constituted grounds for removal. The personal representative "is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate." § 30-2464(a).

The record shows that the progression order was entered after Line informed the court that he could resolve problems with contested claims and the federal estate tax return within 45 days, that is, by March 9, 1987. During his deposition on April 10, Line stated that the federal estate tax return would be prepared within 2 weeks. At the May 29 hearing, Line admitted he had not yet prepared the federal estate tax return and stated that the federal estate tax would be approximately $35,000. Line also failed to advise the court and counsel for the appellees that any adjustment was needed with respect to the 45-day schedule.

In the absence of any communication from Line as to why he could not comply with the progression order, Line's conduct constituted a breach of his duty to the court and to the estate. It was shown at the May 29 hearing that Line failed totally to comply with the order of the court. Under these circumstances, the county court erred in failing to remove Line as personal representative, and the district court was correct in reversing the county court order and ordering Line removed as personal representative.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARD W. HAYDEN, APPELLANT.

444 N.W.2d 317

Filed August 11, 1989. No. 88-790.

1. **Insanity: Mental Health: Time.** The time limits set forth in Neb. Rev. Stat. §§ 29-3701 and 29-3702 (Reissue 1985) are directory, not mandatory, and dismissal of the proceedings is not a proper remedy for a nonprejudicial violation of §§ 29-3701 and 29-3702.
2. **Evidence: Trial: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
3. **Rules of Evidence: Expert Witnesses: Hearsay.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
4. **Mental Health: Final Orders: Proof: Appeal and Error.** The Supreme Court will not interfere on appeal with a final order of the district court in a mental health commitment proceeding unless, as a matter of law, the order is not supported by clear and convincing proof.
5. **Mental Health: Proof: Evidence: Time.** In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing. Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition.
6. **Mental Health: Proof: Evidence.** In order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue.
7. **Mental Health: Other Acts.** In determining whether an act is sufficiently recent to be probative of dangerousness, each case must be decided on the basis of the surrounding facts and circumstances.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Richard J. Epstein for appellant.

Robert M. Spire, Attorney General, and Vanessa R. Jones for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from the district court for Douglas County. Defendant, Ward W. Hayden, appeals his commitment to the

Lincoln Regional Center (Regional Center) in conjunction with his acquittal, by reason of insanity, of stabbing his ex-wife. The stabbing occurred on October 10, 1987.

On October 15, 1987, defendant was charged with second degree assault and use of a knife to commit a felony in violation of Neb. Rev. Stat. §§ 28-309 and 28-1205 (Reissue 1985). After a bench trial on March 16 and April 4, 1988, defendant was acquitted by reason of insanity. On April 5, defendant was ordered admitted to the Regional Center for a period not to exceed 90 days for the evaluation of his mental condition and for the preparation of a treatment plan pursuant to Neb. Rev. Stat. § 29-3701(4) (Reissue 1985). The district court further ordered that the evaluation and treatment plan be submitted to the court no later than June 24, 1988.

On July 8, 1988, defendant filed a motion to dismiss the commitment proceedings because the Regional Center had not submitted an evaluation and treatment plan to the court by June 24 and because the State failed to conduct an evidentiary hearing prior to the expiration of the 90-day evaluation period, in violation of Neb. Rev. Stat. § 29-3702 (Reissue 1985). During a hearing on July 14, the district court denied defendant's motion to dismiss and extended the evaluation period 60 days pursuant to defendant's § 29-3701(6) motion requesting a separate evaluation.

After an evidentiary hearing on August 18, 1988, the court ordered that defendant be committed to the Regional Center pursuant to the conditions set forth in the evaluation and individualized treatment plan (report) of Dr. Leonard Woytassek, dated June 23, 1988.

Defendant's motion for new trial was overruled. He timely appealed to this court, contending the district court erred in (1) failing to dismiss the commitment proceedings because the State and the Regional Center failed to meet the statutory time limits set forth in §§ 29-3701 and 29-3702, (2) allowing in evidence the report "containing hearsay" submitted by Dr. Woytassek, and (3) granting an unauthorized delegation of judicial authority to Dr. Woytassek to determine the conditions of defendant's confinement. Defendant further contends the State failed to prove by clear and convincing evidence that he

was dangerous to himself or others by reason of mental illness or would be dangerous in the foreseeable future as demonstrated by an overt act or threat. We affirm.

In his first assignment of error, defendant contends the commitment proceedings should have been dismissed because Dr. Woytassek's report was not received by the court "at least ten days prior to the expiration of the evaluation period" in violation of § 29-3701(5) and because he did not receive an evidentiary hearing "prior to the expiration of the evaluation period" provided for in § 29-3701.

The order directing that defendant be admitted to the Regional Center for purposes of evaluation was entered April 5, 1988. Under Neb. Rev. Stat. § 25-2221 (Reissue 1985), the 90-day evaluation period expired on July 5. During the July 14 hearing, the district judge noted that he and his staff had been on vacation from June 17 through July 4. When the mail was opened on July 5, the court found Dr. Woytassek's June 23 report and notified counsel that the evaluation had been received.

The district judge subsequently overruled defendant's motion to dismiss the commitment proceedings, but granted defendant's oral motion requesting an extension of time for additional evaluation by an expert of his own choice. The court then extended the original evaluation period an additional 60 days, pursuant to § 29-3701(6). The August 18 dispositional hearing was held more than 10 days prior to the expiration of the 60-day extension.

In conjunction with his first assignment of error, defendant claims the 90-day evaluation period should be analogized to his right to a speedy trial. In *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987), this court noted that while the Nebraska speedy trial statutes, Neb. Rev. Stat. §§ 29-1205 et seq. (Reissue 1985), provide for the sanction of dismissal if the defendant is not tried within the 6-month statutory period, §§ 29-3701 and 29-3702 do not. We held in *State v. Steele* that the time limits set forth in §§ 29-3701 and 29-3702 were directory, not mandatory, and that dismissal of the proceedings was not a proper remedy for a nonprejudicial violation of §§ 29-3701 and 29-3702. As in *State v. Steele, supra*, we find that defendant was not

prejudiced by a failure to meet the statutory time limit, especially in light of his own motion to extend the evaluation period another 60 days. His first assignment of error is without merit.

In his second assignment of error, defendant contends the admission in evidence of Dr. Woytassek's June 23 report was improper because the report contained inadmissible hearsay in the form of "various hearsay notations by support personnel who were not qualified to testify as expert witnesses." Brief for appellant at 34. It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. McSwine*, 231 Neb. 886, 438 N.W.2d 778 (1989).

Section 29-3701(2) provides that the superintendent of the regional center or director of the facility to which the person has been committed for evaluation (in this case, Dr. Woytassek) is responsible for supervising the evaluation and the preparation of an individualized treatment plan. Section 29-3701(5) requires that the evaluation and treatment plan include the facts upon which conclusions stated therein are based. The statute also requires that the evaluation and treatment plan be submitted to the court. Section 29-3702 provides that a representative of the facility where the person was evaluated may testify as to the results of the evaluation and the contents of the treatment plan.

Neb. Evid. R. 703 (Neb. Rev. Stat. § 27-703 (Reissue 1985)) further provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See, also, *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985); *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978).

At the August 18 hearing, Dr. Woytassek testified that he was a psychiatrist and director of the security unit at the Regional

Center. Defendant stipulated to Dr. Woytassek's credentials. Dr. Woytassek testified that he and other staff members performed psychiatric interviews and laboratory examinations of defendant, that written reports of the results of the examinations were provided to and reviewed by Dr. Woytassek, and that the results of the examinations were reflected in Dr. Woytassek's June 23 report to the court. As to defendant's prior medical background, Dr. Woytassek testified that he reviewed reports from the Veterans' Administration and a report by Dr. Bruce Gutnik. Dr. Woytassek also reviewed information contained in the police reports regarding this incident.

We conclude that the statements complained of were admitted as foundation for Dr. Woytassek's diagnosis and opinion that defendant was mentally ill and dangerous. Section 29-3701(5) specifically requires that evaluations and treatment plans submitted to the court "include the facts upon which conclusions stated therein are based." Under rule 703, these facts or data, if of a type reasonably relied upon by experts in the field in forming opinions upon the subject, need not be admissible in evidence. The district judge did not abuse his discretion in admitting the evaluation and treatment plan in evidence. Defendant's assertion to the contrary is without merit.

Defendant further contends that the court's order of August 19, 1988, reflects "an unauthorized delegation of judicial authority to Dr. L. E. Woytassek of the Lincoln Regional Center to determine the conditions of the appellant's confinement," in violation of Neb. Const. art. I, § 13. Brief for appellant at 33. He also contends the August 19 order fails to specify the conditions of confinement regarding defendant's freedom of movement outside the locked facilities of the Regional Center, contrary to the requirements of § 29-3702.

Section 29-3702 provides, in part:

> The court shall specify the conditions of confinement regarding the person's freedom of movement outside locked facilities at the place of confinement, including whether or not the facility may grant the person leave into the community for any period of time, however short. The order of commitment specifying the conditions of

> confinement shall include a finding by the court that any freedom of movement accorded the person outside a locked facility is consistent with the safety of the public.

The August 19 court order states in part as follows:

> On August 18, 1988 an evidentiary hearing was held pursuant to Nebraska Revised Statutes 29-3702.
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Ward W. Hayden shall be committed to the Lincoln Regional Center pursuant to the conditions set forth in the report dated June 23, 1988 by Doctor L. E. Woytassek of the Lincoln Regional Center. Said report will be marked as Exhibit 1 and incorporated by reference and the treatment proposed in said report is hereby approved by the Court.

The issue we have been asked to decide is, apparently, whether the court's incorporation by reference of the conditions of confinement set forth in Dr. Woytassek's report somehow denies defendant access to the district court. See, e.g., *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980).

Unlike the situation in *Drennen v. Drennen, supra*, defendant has had access to the district court as trier of fact throughout these proceedings. We note that § 29-3701(4) provides that individualized treatment plans submitted to the court

> shall contain a statement of the nature of the specific mental and physical problems and needs of the person, a statement of the least restrictive treatment conditions necessary to achieve the purposes of the plan, a statement of the least restrictive treatment conditions consistent with the safety of the public, and a description of intermediate and long-range treatment goals and a projected timetable for their attainment.

Accordingly, the treatment plan submitted by Dr. Woytassek contained the following proposed conditions of confinement:

> LEAST RESTRICTIVE TREATMENT SETTING
>
> The Security Unit of the Lincoln Regional Center is the

least restrictive treatment center setting necessary for Mr. Hayden's treatment needs and the safety of the public.

PRIVILEGES REQUESTED 1. Permission is requested to take Mr. Hayden to medical appointments in the community and to a local general hospital for medical treatment in the event such treatment becomes necessary. This would include both emergency and non-emergency treatments. During these outings he would be under the supervision of the Lincoln Regional Center staff.

. . . .

3. Permission is requested to take Mr. Hayden out of the unit for activities on the grounds with a staff/patient ratio of 1:1. We designate this a Code 1 status. No additional privileges are being requested.

Defendant had the opportunity to, and did, offer evidence contesting these proposed conditions at the August 18 hearing.

Defendant states in his brief that "[t]he June 23, 1988 report from Dr. Woytassek only requested certain privileges be granted the Appellant. By the District Court failing to respond properly to the request of Dr. Woytassekit [sic] has, in effect, allowed Dr. Woytassek to make a judicial decision which was the District Court's to make." Brief for appellant at 33. This argument is without merit. In its August 19 order incorporating the June 23 report, the district court found that the security unit of the Regional Center was the least restrictive treatment center setting necessary for defendant's treatment needs and the safety of the public. The court granted permission for defendant to leave the locked facility (1) to seek medical treatment under the supervision of Regional Center staff and (2) to perform activities on the grounds with a staff/patient ratio of 1 to 1.

We further note that a person committed pursuant to § 29-3702 has access to the court to seek review of the conditions of his confinement, pursuant to § 29-3703.

In his final assignment of error, defendant claims the State failed to prove by clear and convincing evidence that he was dangerous to himself or others by reason of mental illness or would be dangerous in the foreseeable future as demonstrated by an overt act or threat. The Supreme Court will not interfere on appeal with a final order of the district court in a mental

health commitment proceeding unless, as a matter of law, the order is not supported by clear and convincing proof. *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987).

At the August 18 hearing, Dr. Woytassek testified that defendant suffered from "[']Axis I, Atypical Psychosis (principle diagnosis) (sic), 2. Cannabis Dependence, and 3. Alcohol Dependence; Axis II' . . . 'Personality Disorder, NOS, with antisocial, passive aggressive and unstable features.' " This diagnosis was based on the following information, which is contained in the June 23 report:

> [DR. WOYTASSEK]: The findings were that Mr. Hayden had "a history of psychotic episodes, one" of "which resulted in his being discharged from the military and one which occurred during" his "attack on his wife." It's also indicated [in the June 23 report] he lacked insight, his judgment was poor, and he tended "to minimize the importance of" the "attack on his wife. He has a history of hearing voices and" having "violent outbursts and has been previously diagnosed as . . . a schizophrenic, paranoid type . . . . He . . . has a long history of drug and alcohol abuse" and "[a] long history of violence . . . . He has failed to follow treatment and he denies that he has a drug or alcohol problem or that he is ill." Further, that he "is mentally ill . . . dangerous," and in need of a "period of treatment under close" observation "to develop . . . insight" into "his illness and control of his behavior."

Dr. Woytassek testified that defendant's alcohol and cannabis abuse tended to aggravate the conditions or behavior disorders but that defendant tended to deny that he had an alcohol problem, tended to deny that he abused cannabis, and tended to deny the importance of his assault of his ex-wife. Dr. Woytassek testified that defendant did not recognize the severity of the attack on his ex-wife. Dr. Woytassek also testified that he considered defendant to be "presently dangerous."

On cross-examination, Dr. Woytassek admitted that during the time defendant was in the Regional Center security unit, defendant had not suffered from hallucinations or delusions and was oriented to time, place, and person. He was not

depressed, was able to carry on rational conversations, was not a behavioral problem, and had responded to treatment.

Regarding the stabbing of defendant's ex-wife in October 1987, Dr. Woytassek testified that this incident would be only indirectly relevant to defendant's present status "because Mr. Hayden has been locked up for some of that period of time and he doesn't have access to substances, so I feel that that is an important issue to assess, his dangerousness." Dr. Woytassek also agreed that it would be a relevant factor in assessing dangerousness if a person was not confined and did not commit dangerous acts.

Dr. Woytassek was not aware that defendant had not been confined from November 6, 1987, through April 4, 1988.

Dr. Bruce Gutnik, a psychiatrist, testified that he performed a psychiatric examination of defendant on August 3, 1988. During a previous examination on March 23, 1988, Dr. Gutnik determined that defendant suffered from paranoid schizophrenia. Dr. Gutnik noted that between March 23 and August 3, defendant had been doing well without the use of any antipsychotic medication. The significance of this fact was that "one of two things is occurring: either his diagnosis would more appropriately have been schizophreniform psychosis back on March 23rd . . . or his diagnosis perhaps was schizophrenia, and he now is in remission . . ." A third possibility was that defendant suffered from atypical psychosis. Dr. Gutnik testified that defendant's condition had improved since March 1988 and that "[a]t the present time I found no signs of psychosis." Dr. Gutnik was of the opinion, based on his August 3 examination, that defendant did not suffer from atypical psychosis at that time, was not presently dangerous, and did not need to be hospitalized as an inpatient at the Regional Center.

Dr. Gutnik testified, however, that defendant "certainly is going to need to be monitored closely. He has several episodes in his history of having become psychotic . . . ." Dr. Gutnik suggested that defendant pursue "an outpatient-type commitment treatment program where someone can follow him on a close basis" and agreed that defendant needed to stay away from alcohol and drugs. Dr. Gutnik also agreed that defendant could become dangerous if he used alcohol and

drugs.

Defendant testified that from November 6, 1987, through April 4, 1988, he lived at his parents' home, within 1 mile of his ex-wife, but performed no further acts against her. He testified that during this time he had access to an automobile, worked as a nurse's aide, and attended classes at Bellevue College. Defendant admitted that he had a problem with alcohol and marijuana, but stated that he did not commit any violent acts, drink, or use drugs during this period and intended to seek outpatient treatment for his drug and alcohol problems.

Section 29-3702 provides that the court may enter an order of commitment if the court determines there is clear and convincing evidence that the person is dangerous to himself or others by reason of mental illness or defect, or will be so dangerous in the foreseeable future, as demonstrated by an overt act or threat.

At the August 18 hearing, both psychiatrists testified regarding their diagnoses of defendant's psychiatric disorders. Dr. Woytassek was of the opinion that defendant suffered from atypical psychosis. Dr. Gutnik testified that defendant possibly suffered from a type of schizophrenia, schizophreniform psychosis, or atypical psychosis. Although defendant contends that Dr. Woytassek's diagnosis was "seriously flawed," the court, as the trier of fact, was not required to take the opinion of either expert as binding. See *State v. Mayfield*, 212 Neb. 724, 325 N.W.2d 162 (1982). The record contains clear and convincing evidence that defendant has some form of mental illness.

The most recent overt act demonstrating defendant's dangerousness to others occurred on October 10, 1987, when defendant stabbed his ex-wife. Defendant contends this incident was too remote to be probative of his dangerousness to others.

In appeals from proceedings under the Nebraska Mental Health Commitment Act, we have stated:

> "In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing. Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the

> hearing are probative of the subject's present mental condition. 'But a mere recitation of past acts, in the absence of a showing that such clearly forms the foundation for a prediction of future dangerousness, cannot serve as the basis for a finding that one is a mentally ill person . . . .' . . .
>
> In order for a past act to have any evidentiary value it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue."

In re Interest of McDonell, 229 Neb. 496, 499, 427 N.W.2d 779, 781 (1988) (quoting *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981)). This court also has stated that in determining whether an act is sufficiently recent to be probative of dangerousness, "[e]ach case must be decided on the basis of the surrounding facts and circumstances." *Hill v. County Board of Mental Health*, 203 Neb. 610, 615-16, 279 N.W.2d 838, 840-41 (1979).

In the case at bar, defendant kicked in the door of his ex-wife's home and assaulted her violently, both physically and verbally, in the presence of two of their children. He eventually stabbed her with a knife, causing a deep laceration in the buttock and rear of the upper thigh. She also suffered a defensive wound to the hand. Defendant and his ex-wife had been divorced in August 1987. During the time of the divorce, defendant had verbally and physically assaulted his ex-wife several times and had destroyed some of her property. There is clear and convincing evidence that defendant suffers from some form of mental illness. There also is evidence that defendant has a history of cannabis and alcohol abuse, that he lacks control and insight over these problems, and that he tends to become violent after using these substances. Drs. Woytassek and Gutnik both testified that defendant should be closely monitored and needs treatment with respect to his abuse of drugs and alcohol. Defendant has a history of psychotic episodes.

Under the circumstances of this case, we cannot say, as a matter of law, that the October 1987 stabbing incident was too remote to be probative of defendant's dangerousness to others. We determine that the order of the district court is supported by

clear and convincing proof.

The judgment of the district court is affirmed.

AFFIRMED.

LARRY R. DEMERATH, APPELLANT, V. DELORES A. DEMERATH, APPELLEE.

444 N.W.2d 325

Filed August 18, 1989. No. 87-723.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Larry R. Demerath, pro se.

James J. Frost, of North & Black, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

PER CURIAM.

Larry R. Demerath appeals a judgment of the district court for Douglas County authorizing his former wife, Delores A. Demerath, to remove the children from the state.

"Generally, before the court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent." *Vanderzee v. Vanderzee*, 221 Neb. 738, 739-40, 380 N.W.2d 310, 312 (1986); *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986). The record shows that Delores has remarried and that she and her new husband wish to move to another state for business reasons.

> "As a general rule, all other circumstances being equal, legitimate career changes of the custodial parent, whether they be job-related or matrimonial in nature, will support an application for changing the residence of a child placed in that parent's custody." . . . If there is a legitimate reason

> for the custodial parent's decision to leave the jurisdiction, the minor child will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the child to continue to live with that parent. . . . Custody is not to be interpreted as a sentence to immobility.

(Citations omitted.) *Hicks v. Hicks*, 223 Neb. 189, 195, 388 N.W.2d 510, 515 (1986).

Based on our de novo review of the record, we conclude that allowing Delores to retain custody and remove the children is consistent with the best interests of the children. The trial court did not abuse its discretion in granting Delores' motion. In the absence of an abuse of discretion, a trial court's decision bearing upon the custody of minor children will not be disturbed on appeal. *Maack v. Maack, supra.*

The decision of the district court is affirmed.

AFFIRMED.

D. D. LEMKE AND FRIEDA LEMKE, APPELLEES, V. NORTHWESTERN PUBLIC SERVICE COMPANY, A FOREIGN CORPORATION, APPELLANT.

444 N.W.2d 326

Filed August 18, 1989. No. 87-903.

1. **Motions for New Trial: Proof: Appeal and Error.** Where a district court grants a new trial without stating its reasons, an appellant fulfills its burden to attack that ruling by submitting the record to the Supreme Court with the contention that there is no prejudicial error; the burden then shifts to the appellee to identify any prejudicial error in the record which justified the granting of a new trial.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling will be upheld on appeal; however, a motion for new trial is to be granted only where there is error prejudicial to the rights of the unsuccessful party.
3. **Judgments.** A party who has sustained the burden and expense of trial and has succeeded in obtaining judgment has the right to keep the benefit of that judgment.
4. **Motions to Dismiss.** In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.

5. _____. In considering the evidence for the purpose of ruling on a motion to dismiss, the party against whom a motion is made is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed.

John A. Wolf, of Shamberg & Wolf, for appellant.

Stephen L. Ahl, of Wolfe, Anderson & Beverage, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

In this appeal from a bench-tried negligence action, defendant-appellant, Northwestern Public Service Company, assigns error to the district court's order granting plaintiffs-appellees, D.D. Lemke and his wife, Frieda Lemke, a new trial. We reverse.

The Lemkes owned an apartment building at Grand Island, Nebraska, to which Northwestern supplied natural gas. The building sustained fire damage, which the Grand Island deputy fire chief attributed to a natural gas explosion. In his opinion, the regulator attached to the rear of the building, which abutted a sidewalk adjacent to a parking lot, had been damaged, and, as a result, gas was permitted to flow into the building at an excessive pressure, thereby causing various pilot lights to become extinguished and gas to accumulate in the structure until it was ignited by some source. No barricades or other equipment protected the regulator.

The district court received in evidence a Grand Island ordinance which required that when "exposed to probable vehicular damage due to proximity to alleys, driveways or parking areas, aboveground gas . . . regulators . . . shall be suitably protected." The district court also received in evidence §§ 192.351, 192.353(a), and 192.357(a) of subpart H of part 192 of the U.S. Department of Transportation Pipeline Safety

Regulations, adopted pursuant to 49 U.S.C. §§ 1671 et seq. (1982), and 49 C.F.R. § 1.53 (1988), which mandate that regulators be "protected from corrosion and other damage." In addition, the district court received in evidence § 2.7.2(b) of National Fire Protection Association Pamphlet No. 54, adopted by the Nebraska State Fire Marshal pursuant to Neb. Rev. Stat. § 81-502 (Reissue 1987), which related to the location and protection of gas meters.

The district court sustained Northwestern's objection to a report apparently prepared by one or more members of the State Fire Marshal's office on the ground that the report contained hearsay. This state report recites that it encloses the report of one Jay Determan, an employee of Northwestern. No such document is in fact a part of the state report. A document purporting to be signed by Determan is, however, attached to the Grand Island deputy fire chief's report. A part of that report was received by the district court with the following words: "The Court is receiving that aspect from the report that the [deputy] fire chief testified to and nothing else." Thus, the Determan document is not part of the evidence. That document states that the regulator shown Determan by Grand Island's deputy fire chief "appeared to have been hit by a vehicle."

At the close of the Lemkes' evidence, Northwestern moved for dismissal of the action. After the district court took that motion under advisement, Northwestern rested without adducing any evidence and renewed its motion for dismissal. The court again took the matter under advisement and, in due course, sustained Northwestern's motion to dismiss "at the conclusion of the [Lemkes'] case in chief." In its memorandum, the district court, in sum, reasoned that while the Lemkes proved Northwestern negligently failed to protect the regulator, they failed to prove that such negligence was the proximate cause of the fire.

Northwestern correctly maintains that where, as here, a district court grants a new trial without stating its reasons, an appellant fulfills its burden to attack that ruling by submitting the record to the Supreme Court with the contention that there is no prejudicial error; the burden then shifts to the appellee to identify any prejudicial error in the record which justified the

granting of a new trial. *Belitz v. Suhr*, 208 Neb. 280, 303 N.W.2d 284 (1981). While it is true that a motion for new trial is addressed to the discretion of the trial court and that absent an abuse of that discretion the trial court's ruling will be upheld on appeal, it is also true that a motion for new trial is to be granted only where there is error prejudicial to the rights of the unsuccessful party. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). This is so because a party who has sustained the burden and expense of trial and has succeeded in obtaining judgment has the right to keep the benefit of that judgment. *Id.*

The Lemkes assert that the district court's failure to receive the report containing the Determan document constituted prejudicial error such as to justify the grant of a new trial. They claim the questioned report was admissible because at a pretrial conference Northwestern had waived any objection to its receipt. Since the Determan document is attached to the Grand Island deputy fire chief's report, the question becomes what the record shows as to the waiver of objections to the receipt of that report. The bill of exceptions reflects that the district court accepted the statement of Northwestern's counsel that he had not seen the report and thus concluded that the admissibility of the report "wasn't agreed upon" at the pretrial conference. The Lemkes establish no other basis on which the report containing the Determan document should have been received. Thus, the portion of the deputy fire chief's report containing the Determan document was properly excluded from the evidence.

However, that determination does not end our inquiry, for the district court resolved the case by sustaining Northwestern's motion to dismiss made at the close of the Lemkes' evidence. It is important not to confuse the function of a district court in ruling on a motion to dismiss with its function as the finder of fact in adjudicating the controversy in an action at law tried without a jury. In sustaining a motion to dismiss, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for the purpose of such a motion, the party against whom a motion is made is entitled to have every controverted fact resolved in its favor and to have

the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989); *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986).

We recognize that in *Butorac v. Dixon County*, 232 Neb. 598, 441 N.W.2d 620 (1989), because the trial court as the trier of fact had the benefit of all the evidence, we treated the sustainment of a motion to dismiss as a disposition on the facts. However, the tenor of the district court's memorandum in this case does not permit us to conclude that it resolved the case on a basis other than one of law. Thus, the question becomes whether the record presented the district court with an issue of fact.

The proximity of the regulator to a parking lot does not in and of itself, as the Lemkes suggest, support a factual inference that the damage was caused by a motor vehicle and that, thus, violation of the Grand Island ordinance was necessarily the proximate cause of the explosion and resultant fire. Whatever may be the applicability of the state pamphlet or the import of the federal regulations, their provisions cannot be read so broadly as to make Northwestern an insurer that its regulator will never sustain damage from any source. Thus, under the circumstances of this case, the Lemkes' failure to establish the cause of the regulator damage results in a failure to prove a prima facie case.

Accordingly, Northwestern's motion to dismiss at the close of the Lemkes' evidence was properly sustained. It therefore follows that the district court abused its discretion in granting a new trial.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. LORI A. CULVER, APPELLANT.

444 N.W.2d 662

Filed August 18, 1989. No. 88-419.

1. **Verdicts: Appeal and Error.** It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Theft: Value of Goods: Words and Phrases.** Under Neb. Rev. Stat. § 28-511(1) (Reissue 1985), theft consists of taking or exercising control over movable property of another with intent to deprive him or her thereof. The value of the property stolen is no longer an element of the crime and is important only in determining the penalty.
3. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race for the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.
4. **Trial: Juries: Discrimination: Appeal and Error.** A trial court's determination as to whether a defendant has established purposeful discrimination in the selection of a jury is a finding of fact which will not be reversed on appeal unless clearly erroneous.
5. **Constitutional Law: Equal Protection: Jurors.** The equal protection clause does not prohibit peremptory challenges against jurors on the basis of gender.
6. **Constitutional Law: Juries.** The fair cross-section principle, derived from the sixth amendment to the Constitution of the United States, does not apply to the use of peremptory challenges in the selection of petit juries.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

After trial to a jury, the defendant, Lori A. Culver, was convicted on four counts of misdemeanor theft and was

sentenced to probation for 2 years. As part of the sentence, the defendant was to be confined in the county jail for 90 days, with credit for 51 days, and was required to make restitution to the victims.

Upon appeal, the defendant contends that the evidence was not sufficient to sustain the verdicts of guilty and that the trial court erroneously permitted the State to exercise peremptory challenges upon the basis of gender.

The offenses consisted of stealing purses from a dressing room at a church wedding. The victims were the bride, Diane Quesada, and her attendants at the wedding on November 30, 1985, which took place at the Berean Fundamentalist Church in Lincoln, Nebraska. The room used as a dressing room was a classroom on the south hall of the church. The thefts were discovered just before the ceremony was to begin. At about that time, the defendant and a man, neither of whom were guests at the wedding, were seen leaving the church in a suspicious manner. The defendant was carrying a large, cylindrical-shaped gym bag over her shoulder, which appeared to be full.

Most of the victims and other persons who saw the defendant leaving the church were unable to make a positive identification of the defendant. However, Beth McCulley, who was a bridesmaid and whose purse was stolen, testified that at about 1:30 p.m., when she returned to the dressing room to get a Kleenex from her purse, she noticed two individuals in the doorway of the dressing room who were in the process of leaving the room. She described the individuals as a male, with light-brown hair and a mustache, who was wearing a tan trenchcoat. The other individual was a large-framed woman with very dark brown hair, wearing a royal-blue and black cape. Her observations were made from within a few feet of these individuals. After watching the individuals walk down the hall, she entered the dressing room and found her purse missing.

After the wedding, McCulley gave a brief description of the incident and the suspects to a police officer and on several occasions thereafter met with the sheriff's office in an attempt to identify the defendant. She first looked at individual photographs and then at a photographic lineup. Several weeks after the wedding, McCulley made a positive identification of

the defendant and the man that she had seen leaving the dressing room at the church on November 30, 1985. At trial, however, McCulley was unable to positively identify the defendant as the individual she had seen at the church and had no recollection independent from the photographs from which she had made her earlier identification.

There was other evidence that connected the defendant with the thefts through the use, on the day of the theft, of bank and credit cards which were stolen from McCulley. The defendant's companion, Allen Robinson, was identified through photographs made at the time the stolen bank and credit cards were used at an automatic teller machine in Lincoln. The defendant and Robinson were living together in Manhattan, Kansas, and a search of their residence resulted in the discovery of physical evidence which matched items shown in the photographs taken at the Bank-In-The-Box location in Lincoln.

Joseph Splichal, a detective sergeant in the Lancaster County Sheriff's Department, participated in the followup investigation of the thefts and specifically assisted in the execution of the search warrant. Splichal had shown McCulley a photographic lineup of possible suspects and testified that McCulley had identified the defendant as the woman she had seen leaving the dressing room at the church. McCulley had also identified the defendant's companion as Robinson.

Although much of the evidence was circumstantial, it was sufficient, if believed, for the jury to find beyond a reasonable doubt that the defendant had participated in each of the thefts. It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Bowen,* 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Andersen,* 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Wickline,* 232 Neb. 329, 440 N.W.2d 249 (1989).

The defendant also contends that the evidence was not sufficient to support the finding by the jury that the items

stolen from Marissa Brownawell, a bridesmaid in the wedding, had a value of $40, and the items stolen from Barbara Morrison, the maid of honor, had a value of $50.

Neb. Rev. Stat. § 29-2026.01 (Reissue 1985) provides: "When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in its verdict the value of the property stolen, embezzled, or falsely obtained."

Brownawell valued her purse at $15, and the contents, which included socks, new makeup, and an address book, at about $20. Morrison testified that her purse was a black leather clutch purse with a zipper across the top and contained $10 to $15, a checkbook, a J.C. Penney credit card, a Bank-In-The-Box card, a Wesleyan identification card, and a Sports Courts membership card.

Theft consists of taking or exercising control over movable property of another with intent to deprive him or her thereof. Neb. Rev. Stat. § 28-511(1) (Reissue 1985). The value of the property stolen is no longer an element of the crime and is important only in determining the penalty. See, *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983); *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988); *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). To the extent that *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987), and *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987), state that the value of the property stolen is an element of the crime charged, that language is disapproved. The determination of the value of the property stolen, of course, remains a question to be determined by the jury.

Neb. Rev. Stat. § 28-518(4) (Reissue 1985) provides: "Theft constitutes a Class II misdemeanor when the value of the thing involved is one hundred dollars or less."

The finding by the jury as to the value of the items stolen from the victims Brownawell and Morrison, even if erroneous, was not prejudicial, since any finding of a value of $100 or less would support verdicts of guilty of Class II misdemeanor theft.

The defendant's other assignment of error relates to the State's exercise of its peremptory challenges.

The record shows that of the 24 persons selected to be examined in voir dire, 11 were men and 13 were women. During the examination, the State exercised six peremptory challenges to exclude men. Defense counsel objected that these challenges had been made on the basis of gender discrimination and asked the trial court to require the State to explain why those individuals were struck. The defendant's request was denied.

In *State v. Thompson*, 231 Neb. 771, 779, 438 N.W.2d 131, 138 (1989), we held:

> "In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race for the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race."

Quoting *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). Ultimately, we held that a "trial court's determination as to whether a defendant has established purposeful discrimination in the selection of a jury is a finding of fact which will not be reversed on appeal unless clearly erroneous." *Thompson, supra* at 780, 438 N.W.2d at 138.

In this case, the trial court made no finding that the defendant had made the required prima facie showing of discriminatory intent. In fact, the assignment of error could be disposed of on the basis that the trial court's implied finding of no showing of a discriminatory intent was not clearly erroneous. *State v. Rowe, supra*; *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987).

Our decision in *Thompson* relied on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The defendant argues that *Batson* should be extended to apply to discriminatory practices based on gender as well as race.

The Supreme Court of Rhode Island in *State v. Oliviera*, 534 A.2d 867 (R.I. 1987), held that *Batson* does not extend to gender-based discrimination. In that case, the defendant, Oliviera, was convicted on two counts of assault with intent to

commit sexual assault and on one count of second degree child molestation. On appeal, he contended that the prosecution had discriminated against male members of the jury panel in exercising peremptory challenges in violation of the equal protection clause of the 14th amendment. During voir dire, the State had exercised six of its seven peremptory challenges to strike male members of the jury panel. The defendant objected, asserting gender-based discrimination contrary to the holding of *Batson*. The court in *Oliviera* specifically held that *Batson* did not extend to gender-based discrimination because of the fact that throughout the decision, the Court in *Batson* refers exclusively to discrimination based upon *race*. In referring to the *Batson* decision, the court stated:

> It clearly preferred to limit the new standard to racially-based discrimination.
>
> . . . .
>
> . . . [I]f the use of gender as a criterion for exercising peremptory challenges is prohibited, *all* such challenges will become inherently suspect. Opposing counsel could demand an alternative explanation for every challenge exercised. The damage to the peremptory challenge, a vital component of trial by jury, would be enormous, if not fatal.

State v. Oliviera, supra at 870.

Similarly, in *U.S. v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988), the court held that a prosecutor's use of peremptory challenges to exclude women from a criminal petit jury because of their sex did not violate the right of a defendant to an impartial jury and to a jury drawn from a cross section of the community under the 6th and 14th amendments. The court also found that the equal protection clause does not prohibit peremptory challenges against jurors on the basis of gender.

Although the appellate court concluded that the government had exercised several of its peremptory challenges based on sex, it found

> no authority to support an extension of *Batson* to instances other than *racial* discrimination. . . .
>
> . . . .
>
> Although the Court in *Batson* relaxed the evidentiary

> burden of *Swain*, it offered no intimation that it was extending the equal protection safeguards involving peremptory strikes to gender . . . . While the strictures of the Equal Protection Clause undoubtedly apply to prohibit discrimination due to gender in other contexts, there is no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges.
>
> . . . .
>
> Clearly, if the Supreme Court in *Batson* had desired, it could have abolished the peremptory challenge or prohibited the exercise of the challenges on the basis of race, gender, age or other group classification. A careful examination of the *Batson* opinion, however, leads this Court to the firm conclusion that, in light of the important position of the peremptory challenge in our jury system, the Court intended *Batson* to apply to prohibit the exercise of peremptory challenges on the basis of race only.

850 F.2d at 1042-43.

In regard to the sixth amendment claim, the court relied on *Lockhart v. McCree*, 476 U.S. 162, 173-74, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), where the U.S. Supreme Court stated that it had

> never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. . . . [A]n extension of the fair cross-section requirement to petit juries would be unworkable and unsound . . . .

In *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), the Court said:

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular

composition, *Fay v. New York*, 332 U.S. 261, 284 (1947); *Apodaca v. Oregon*, 406 U.S. at 413 (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

See, also, *Teague v. Lane*, ____ U.S. ____, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNIE W. CHAMBERS, APPELLANT.

444 N.W.2d 667

Filed August 25, 1989. No. 88-341.

1. **Trial: Evidence: Appeal and Error.** Admission or exclusion of evidence is a matter for the discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion.
2. **Motor Vehicles: Words and Phrases.** A battery-operated stopwatch is not an "electronic speed measurement" device within the purview of Neb. Rev. Stat. § 39-664 (Reissue 1988).
3. **Convictions: Proof.** To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly.
4. **Trial: Evidence: Proof.** To present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Ernie W. Chambers, pro se.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

After a bench trial in the county court for Lancaster County, Ernie W. Chambers was found guilty on the charge of operating a motor vehicle at the speed of 70 miles per hour in a 55-mile-per-hour zone and was fined $25, plus costs. Chambers appealed to the district court for Lancaster County, which affirmed the county court's decision; hence, Chambers' appeal to this court.

Trooper Robert Stivers of the Nebraska State Patrol, a pilot since 1975, was trained and certified by the State Patrol to use an aircraft for detection of vehicular speed. On September 11, 1986, Stivers was officially maintaining an aircraft patrol of Interstate 80 in Lancaster County, which had a speed limit of 55 miles per hour at the patrol site, when he observed a blue Honda automobile, later determined to be driven by Chambers, passing other cars on the Interstate. Stivers believed that the Honda was "running in excess of the speed limit." By using an "Accusplit 735XP" battery-powered stopwatch, Stivers timed Chambers' vehicle as the car traveled the State Patrol's predetermined course of 5,400 feet 7 inches between two 3- by 4-foot white rectangles painted on the shoulder of the Interstate. According to Stivers' stopwatch, Chambers' car traveled the measured course in 50.61 seconds. In view of the fractional or decimal figure for the time indicated on the stopwatch and consistent with State Patrol policy, Stivers rounded off the time for Chambers' vehicle at 51 seconds and consulted a "speed chart" to convert the determined time into miles per hour. Based on the chart used by Stivers, Chambers' car was traveling 70 miles per hour. Stivers then radioed Sgt. Robert Cruise, who was in his cruiser on the Interstate, and told Cruise that Chambers' Honda was traveling 70 miles per hour on the Interstate. From the aircraft, Stivers helped Cruise

identify Chambers' car and confirmed that Cruise had correctly identified and stopped the vehicle clocked at 70 miles per hour. Cruise testified that in his opinion formed during his observation of Chambers' moving vehicle, Chambers was "traveling in excess of the 55 mile-per-hour speed limit" shortly before Cruise signaled Chambers to pull to the Interstate's shoulder, where Cruise issued Chambers a citation for driving 70 miles per hour in a 55-mile-per-hour zone.

At trial, over Chambers' objection (foundation), only Stivers testified that Chambers was driving at 70 miles per hour. Stivers also testified that the Accusplit stopwatch used to clock Chambers' car was checked for accuracy by Fred Wilson Jewelers on August 18, 1986, and again on December 9, 1986. The State called Fred Wilson, a jeweler, who testified that he used a "Q.T. 10 Quartz Tester" to ascertain the accuracy of Stivers' stopwatch used to time Chambers' car. When asked on direct examination whether "other jewelers, to your knowledge, use a machine just like that [Q.T. 10 Quartz Tester] to check the accuracy of Quartz watches," Wilson responded, "Similar, I'm not sure though." Later, during direct examination of Wilson, when the State offered Wilson's "Stop Watch Certifications" for Stivers' watch, Chambers was allowed to interrogate Wilson, an interrogation which included:

> [CHAMBERS:] And you also don't know whether this machine that you use [the quartz tester] is the one that jewelers in the trade use for the purpose that you stated?
>
> [WILSON:] There's probably a dozen different companies that sell machines that do the same thing.
>
> [CHAMBERS:] But you don't know and you've already testified to that, but I wanted — in response to my question to you, you don't know whether jewelers in the trade use this particular machine as the machine for testing these watches?
>
> [WILSON:] No, I don't.
>
> [CHAMBERS:] Mr. Wilson, when was the last time that your machine was tested to determine whether or not it was accurate?
>
> [WILSON:] As far as I know, it never has been.

Asserting an insufficient evidential foundation, Chambers then objected to introduction of the certification documents. The court overruled Chambers' objection, received the certification documents, and, at the conclusion of evidence, found Chambers guilty of speeding, that is, operating a motor vehicle at 70 miles per hour in a 55-mile-per-hour zone.

Chambers assigns five errors, each of which questions the admissibility of evidence concerning the speed of Chambers' vehicle, which was determined by reference to Stivers' battery-powered stopwatch. Chambers' argument boils down to a contention that the State's evidence of his driving 70 miles per hour, determined by Stivers' timed observation, was inadmissible because the State failed to produce a foundation establishing the accuracy of Stivers' stopwatch.

"Admission or exclusion of evidence is a matter for the discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion." *State v. Olsan*, 231 Neb. 214, 220, 436 N.W.2d 128, 133 (1989).

Much of Chambers' brief revolves around the assertion that Stivers' stopwatch is an "electronic speed measurement" device within the purview of Neb. Rev. Stat. § 39-664 (Reissue 1988), which provides in part:

> (1) Determinations made regarding the speed of any motor vehicle based upon the visual observation of any law enforcement officer may be corroborated by the use of radio microwaves or other electronic device. The results of such radio microwave or other electronic speed measurement may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. Before the state may offer in evidence the results of such radio microwave or other electronic speed measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:
>
> (a) The measuring device was in proper working order at the time of conducting the measurement;
>
> (b) The measuring device was being operated in such a manner and under such conditions so as to allow a

minimum possibility of distortion or outside interference;

(c) The person operating such device and interpreting such measurement was qualified by training and experience to properly test and operate the device; and

(d) The operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order.

In Chambers' previous appeal of a speeding conviction, *State v. Chambers*, 207 Neb. 611, 299 N.W.2d 780 (1980), we determined that § 39-664 was not applicable when the defendant's speed was "determined by use of a mechanical stopwatch." *Chambers, supra* at 614, 299 N.W.2d at 782.

We conclude that § 39-664 is equally inapplicable in the present case. Although the battery-operated stopwatch used by Stivers to time Chambers' car is properly characterized as an "electronic" device, Chambers' argument that the stopwatch is a "speed measurement" device ignores laws even more fundamental and universal than the laws of the State of Nebraska, namely, the laws of physics. Speed, or more correctly, velocity, is a function of distance and time. Time is one of the two elements in the formula v(elocity) = d(istance)/t(ime). A device which measures only one of the two elements utilized in the foregoing formula is not a "speed measurement device," but is either a device to measure time (more commonly known as a clock or watch) or a device to measure distance. Therefore, we conclude that a battery-operated stopwatch is not an "electronic speed measurement" device within the purview of § 39-664.

Acknowledgment of the laws of physics does not end our inquiry in Chambers' appeal. At trial, Chambers objected to introduction of Wilson's "Stop Watch Certifications," which purportedly verified the accuracy of Stivers' stopwatch used to time Chambers' car, and also objected to Stivers' testimony regarding the time registered by the stopwatch for the resultant calculation of Chambers' speed. We must, therefore, consider whether the State established a sufficient evidential foundation for admission of the stopwatch results as evidence that

Chambers' car was traveling 70 miles per hour.

In *State v. Chambers, supra*, we considered the use of a mechanical stopwatch in a speeding case, upheld the defendant's conviction, and stated:

> We believe the foundation evidence was sufficient to allow the State to establish the speed of the defendant's vehicle by use of the stopwatch. The evidence was that Lt. Donald Grieser, the officer flying the airplane, had been trained and certified for clocking ground vehicles from aircraft. The stopwatch had been tested on July 19, 1978, and again on August 25, 1978, and found to be accurate within 1 second per 24 hours or $^{6}/_{10,000}$ of a second per minute. Fred A. Wilson, the jeweler who performed the tests on the stopwatch, testified that the stopwatch had been tested on a Vibrograph machine which was an accepted method for determining the accuracy of watches. The Vibrograph machine was tested occasionally with another Vibrograph machine and other watches whose timekeeping accuracy was verified by a digital watch or an electronic clock.

Id. at 612-13, 299 N.W.2d at 781.

To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be "[r]easonable proof that the . . . machine was accurate and functioning properly." *State v. Kudlacek*, 229 Neb. 297, 301, 426 N.W.2d 289, 292 (1988) (foundation relating to accuracy of radar unit and Intoxilyzer machine). See, also, *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969). In *Snyder* and *Kudlacek*, we rejected the argument that for admissibility of information from a primary instrument, the accuracy of the primary instrument, such as a measuring device, must be established by an appropriate testing device which itself has been tested for accuracy, lest such evidence of testing and the testing itself "might have to proceed ad infinitum" to verify the accuracy of all instruments used. *State v. Snyder, supra* at 466, 168 N.W.2d at 531. See, also, *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957) (an officer's testimony that he drove his patrol car at 60 miles per hour, indicated by the car's speedometer, through the testing range for the radar device used to prove the speed of

the defendant's vehicle was sufficient foundation for admissibility of the radar-determined speed without proof of the speedometer's accuracy). Thus, although we have rejected a requirement that any testing device used to establish the accuracy of a primary measurement device must itself be independently tested, we have recognized such a procedure to thwart a foundational challenge to the primary device's accuracy. See *State v. Chambers*, 207 Neb. 611, 299 N.W.2d 780 (1980) (mechanical stopwatch tested with a Vibrograph, which was in turn itself tested against another Vibrograph).

Without some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise. Undoubtedly, a meaningless test for accuracy in Stivers' stopwatch does not supply the "reasonable proof of accuracy" required for the permissible introduction of evidence concerning information derived from the stopwatch. The test of the stopwatch in the present case somewhat resembles the situation in the apocryphal story of the cannon and the clock, recounted by our Chief Justice. The cannoneer was responsible for firing the cannon in the village square at 6 o'clock each day. When asked how he knew it was time to fire the cannon, the cannoneer answered that he simply looked at the clock in the tower of the village hall at the other end of the street which ran from the square to the hall. When the tower clock indicated 6 o'clock, he fired the cannon. However, when the clockkeeper was asked how he checked the tower clock's accuracy, he said that every time the village cannon fired, he looked up to verify the time, which was always 6 o'clock. In any event, we hold that to present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

In the present case, there is no evidence on either of the bases which we have mentioned for verified accuracy in a stopwatch.

Wilson testified that his Q.T. 10 Quartz Tester had never, to his knowledge, been tested for accuracy. Also, exactly what is a Q.T. 10 Quartz Tester? There is no evidence explaining the nature, function, or operation of a Q.T. 10 Quartz Tester. Further, Wilson testified that he did not know whether other jewelers used the Q.T. 10 Quartz Tester to verify the accuracy of stopwatches. Consequently, in view of the record presented to us, there is no "reasonable proof" of accuracy in the stopwatch used to clock Chambers' car. Evidence that Chambers' car took 51 seconds to travel the predetermined distance on Interstate 80 and was, consequently, traveling at 70 miles per hour was improperly received by the trial court. Evidence based on Stivers' stopwatch was used to prove the charge against Chambers and, therefore, constitutes reversible error. For that reason, we reverse the judgment of the district court, which affirmed the county court's decision, and remand this matter to the district court with the direction that the district court order a new trial for Chambers in the county court.

The county court's reversible error in admitting evidence of speed calculated through information from Stivers' stopwatch is properly characterized as "trial error," which does not bar retrial of Chambers after this reversal of his conviction. See, *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (retrial after reversal of a defendant's conviction, when the reversal resulted from "trial error," that is, "a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct," 437 U.S. at 15); *Lockhart v. Nelson*, ____ U.S. ____, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988) (double jeopardy clause of the fifth amendment to the U.S. Constitution does not bar retrial of a defendant if all the evidence, whether erroneously admitted or not, supports the action of the trial court or jury). See, also, *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., concurring in part, and in part dissenting.

The majority cites *Burks* and *Lockhart* for the proposition that mere trial error does not bar retrial if all the evidence, whether erroneously admitted or not, supports the action of the

trial court or jury. Both cases are based upon the 5th and 14th amendments to the U.S. Constitution and thus comprise federal constitutional law.

I believe the better approach would be to follow this court's decision in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), where we considered whether the remaining evidence was sufficient, absent the procedural or "trial error." Although in *Palmer* we did not explicitly base our ruling on Neb. Const. art. I, § 12, today's decision overrules *Palmer*.

I would reverse and dismiss.

STATE OF NEBRASKA, APPELLEE, V. RICHARD W. WILLETT, APPELLANT.

444 N.W.2d 672

Filed August 25, 1989. No. 88-853.

1. **Criminal Law: Intent.** When a person threatens to commit a crime of violence and has the intent to terrorize another as the result of the threat, he or she violates Neb. Rev. Stat. § 28-311.01(1)(a) (Cum. Supp. 1988).
2. **Criminal Law: Indictments and Informations.** To charge a defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime or in language equivalent to the statutory terms defining the crime charged.
3. **Criminal Law: Prosecuting Attorneys.** When more than one statute prohibits criminal conduct, a prosecutor may select any violated statute as the basis for prosecuting a defendant so long as the prosecutor's selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

Willis G. Yoesel for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Richard W. Willett was charged with threatening "to commit a crime of violence with the intent to terrorize [his wife] Jill Lee Willett by stating he was going to kill her," that is, a violation of Neb. Rev. Stat. § 28-311.01 (Cum. Supp. 1988), which provides: "(1) A person commits terroristic threats if he or she threatens to commit any crime of violence: (a) With the intent to terrorize another; (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation . . . ." "Terroristic threats," described in § 28-311.01(1), is a Class IV felony, see § 28-311.01(2), which has no minimum prescribed penalty, but which is punishable by a maximum sentence of 5 years, a $10,000 fine, or both such imprisonment and fine. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985). A jury found Willett guilty of the charge. On September 22, 1988, the district court for Richardson County sentenced Willett to imprisonment for 5 years. Willett appeals, contending that (1) his conviction is void because his conduct does not come within the purview of § 28-311.01; (2) the evidence is insufficient to sustain his conviction; and (3) the sentence imposed is excessive.

Starting at 11 a.m. on February 21, 1988, Richard Willett, who was cutting wood with a friend, began drinking alcoholic beverages. By 5 p.m. that day, Willett had consumed in excess of 12 cans of beer and an unidentified quantity of other alcoholic beverage. Sometime in the evening of February 21, Jill Willett, assuming and fearing that her husband would return home drunk and commence a quarrel, decided to go to her mother's (Betty Lee's) house and took her 8-year-old daughter, Megan Lee, and her 6-month-old son, William Lee Willett, with her.

Around 3 a.m. on February 22, 1988, Richard Willett, after a full day and evening of drinking alcohol and having become intoxicated, returned to his home and discovered that Jill and the children were gone. Richard Willett then placed a telephone call to Betty Lee's house and spoke with Lee, who told him not to come to her house for his son, or she would call the police. Lee hung up the phone and then called the police.

Richard Willett went to Lee's house and was "beatin' " on

the locked doors when the police arrived. The police briefly spoke with Willett, who told the police that he wanted to take his son home. The police escorted Willett from Lee's premises and returned to Lee's house, where Jill Willett told the officers that she was afraid that the intoxicated Richard Willett would injure her.

While the police were at the Lee residence, Richard Willett again phoned and spoke with Jill Willett while Officer Marty Eickhoff was listening to the conversation on another phone at Lee's. In this conversation, Willett demanded that Jill return his son or Willett would "hunt her down and kill her." Richard Willett also told Jill not to send police to their residence because, if she did, "somebody was going to get killed." During that telephone conversation, both Eickhoff and Jill Willett heard a "clicking" noise in the background at the other end of the line, which they identified as the pumping action of a shotgun. Jill was not afraid that Richard Willett would kill her, but was frightened by his threats of violence.

Police then proceeded to the Willetts' apartment and waited outside. Willett came out of the apartment and started to walk to his car. Officers approached Willett and arrested him. In a subsequent search of the Willetts' apartment, police discovered a pump-action shotgun on the kitchen table near the telephone. Four live shotgun shells were in the gun's magazine. Willett testified that in reference to his telephonic statements to Jill Willett, including his comment that he would "hunt her down and kill her," it was "possible" that he intended to intimidate Jill Willett to return their son, William, to the Willett residence.

In addition to instructing on "terroristic threats," § 28-311.01, the court also gave an instruction on the offense of "intimidation by phone call," a violation of Neb. Rev. Stat. § 28-1310 (Reissue 1985), which provides:

> (1) A person commits the offense of intimidation by phone call if with intent to terrify, intimidate, threaten, harass, annoy, or offend, he:
>
> . . . .
>
> (c) Telephones another and threatens to inflict injury to any person or to the property of any person;
>
> . . . .

(4) Intimidation by phone call is a Class III misdemeanor.

Richard Willett did not object to the instructions given. The jury found Willett guilty of "terroristic threats" (§ 28-311.01). After Richard Willett was evaluated at the diagnostic and evaluation center and a presentence report was submitted on Willett, the court found that Willett was not a suitable candidate for probation and sentenced him to 5 years' imprisonment.

Richard Willett does not challenge the validity of § 28-311.01, but, rather, argues that the evidence does not support his conviction because the statute was intended to be a deterrent to bomb threats and was not intended to apply to the conduct on which his conviction is based. Willett contends that he may have violated § 28-1310, the statutory proscription against "intimidation by phone call," and even suggests that the court may have committed reversible error by "failure to direct a possible verdict of guilty under Section 28-1310." Brief for appellant at 11. Willett's contention about a directed verdict of a defendant's guilt is, to say the least, novel in the annals of American jurisprudence.

Willett's argument concerning the charge against him ignores the unequivocal language of § 28-311.01(1)(a), which provides that a person violates the statute by threatening to commit a crime of violence with the intent to cause terror in another. Without doubt, a threat of murder is a threat to commit a "crime of violence." While § 28-311.01(1)(b) applies to conduct such as a bomb threat, § 28-311.01(1)(a) applies to any threatened commission of a violent crime for the purpose of causing terror to another. Therefore, when a person threatens to commit a crime of violence and has the intent to terrorize another as the result of the threat, he or she violates § 28-311.01(1)(a).

To charge a defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime or in language equivalent to the statutory terms defining the crime charged. *State v. Golgert*, 223 Neb. 950, 395

N.W.2d 520 (1986).

The fact that Willett's conduct may have also contravened § 28-1310 is not a ground for reversing his conviction. When more than one statute prohibits criminal conduct, a prosecutor may select any violated statute as the basis for prosecuting a defendant so long as the prosecutor's selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). See, also, *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986). Willett has not alleged that the prosecutor relied on any "unjustifiable standard" in deciding to charge Willett with a violation of § 28-311.01.

There is no merit in Willett's assigned error concerning the charge against him.

Next, Willett contends that the State failed to prove his requisite intent to terrorize Jill Willett. In his testimony, Willett acknowledged that by his threat to Jill Willett, namely, he would "hunt her down and kill her," it was "possible" that he intended to intimidate Jill into returning the boy, William, to the Willett residence. "When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987).

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Brown, 225 Neb. 418, 428, 405 N.W.2d 600, 606 (1987).

> On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Robertson, 223 Neb. 825, 830, 394 N.W.2d 635, 638 (1986).

The evidence supports the jury's factual conclusion that Richard Willett intended to terrorize Jill Willett for the purpose of her bringing William to the Willett residence. There is no merit in Richard Willett's assignment of error concerning sufficiency of evidence to sustain his conviction.

Willett also contends that the district court imposed an excessive sentence. "[I]n the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal." *State v. Dillon*, 222 Neb. 131, 136, 382 N.W.2d 353, 357 (1986). See, also, *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988); *State v. Hoffman, supra*; *State v. Brown, supra*. The presentence report on Willett shows an extensive history of criminal violations, including Willett's convictions for criminal mischief, trespass, resisting arrest, and third degree assault, the last offense and conviction having occurred within the few months preceding the offense and conviction in the present case. Furthermore, we note that the sentence imposed did not contain or specify a minimum sentence to be served. See Neb. Rev. Stat. § 83-1,110(1) (Reissue 1987) (minimum term; eligibility for release on parole). We conclude that the district court did not abuse its discretion in the sentence imposed on Willett.

Therefore, Willett's conviction and sentence are affirmed.

AFFIRMED.

ALLSTATE INSURANCE COMPANY, PLAINTIFF, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, DEFENDANT.

444 N.W.2d 676

Filed August 25, 1989. No. 88-1004.

1. **Insurance: Contracts.** An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.

2. _____: _____. Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.
3. _____: _____. An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
4. _____: _____. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
5. **Insurance: Motor Vehicles: Liability: Public Policy.** A clause in an automobile liability insurance policy excluding coverage under the liability portion of the policy for bodily injury to the named insured is not invalid in Nebraska as against public policy.

Certified Questions from the U.S. Court of Appeals for the Eighth Circuit. Judgment entered.

Waldine H. Olson, of Schmid, Mooney & Frederick, P.C., for plaintiff.

Eugene P. Welch and Susan E. Fieber, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for defendant.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The U.S. Court of Appeals for the Eighth Circuit has certified two questions of law to this court concerning the coverage under an automobile liability insurance policy issued by the Farmers Mutual Insurance Company of Nebraska. The policy was issued to L.A. Bethune to insure a 1977 Oldsmobile and provided bodily injury liability insurance of $100,000 for each person and $300,000 for each occurrence.

On March 9, 1985, Sylvia T. Miller was driving Bethune's 1977 Oldsmobile in New Mexico with his permission. The automobile was involved in an accident in which both Bethune and Miller received injuries from which they ultimately died. Bethune's estate made a claim for damages against Miller's estate, alleging that Miller's negligence was the proximate cause of the accident.

Prior to the accident, Allstate Insurance Company had issued an automobile liability policy to Miller, which provided

bodily injury liability insurance of $50,000 for each person and $100,000 for each occurrence.

In settlement of the Bethune claim, and without prejudice to any claims the companies might have against each other, Allstate and Farmers each paid $12,500 to Bethune's estate. Allstate then brought a declaratory judgment action in the U.S. District Court against Farmers to determine whether the household exclusion clause in the Farmers policy was valid and excluded coverage to Miller for liability to Farmers' insured, Bethune.

The exclusion clause with which we are concerned is sometimes called the "household exclusion clause" because it commonly excludes coverage for liability for injuries to members of the family of the insured residing in the same household of the insured. In this case, however, we are concerned only with that part of the clause which excludes coverage for liability for bodily injuries to the named insured.

Allstate contended that its named insured, Miller, was driving Bethune's car as a permissive driver; that she was an omnibus insured under the Farmers policy; that the Farmers policy provided primary coverage for the accident; and that the Allstate policy provided excess coverage. Farmers concedes that Miller was a permissive driver and as such would have been an omnibus insured under the Farmers policy, but contends that the household exclusion in Bethune's policy issued by Farmers excluded coverage to Miller for injuries sustained by Bethune.

The case was submitted to the district court upon an agreed statement of facts. The district court found that under the Farmers policy Miller was an omnibus insured and that the policy contained exclusions from coverage, some of which referred to "the named insured" and others to "the insured." The court noted that the household exclusion referred to "the insured" and that Farmers had agreed "to pay on behalf of the insured all sums which the insured became legally obligated to pay as damages because of . . . bodily injury sustained by other persons." The court found the express language of the Farmers exclusion meant that the policy "does not apply under Coverage A to bodily injury to [Ms. Miller] or to any member of the family of [Ms. Miller] residing in the same household as

[Ms. Miller]." The district court further found that the claim against Miller's estate was made by Bethune's estate and that "Mr. Bethune is not Ms. Miller and is not a member of Ms. Miller's family residing in her household." The district court concluded that Miller was not excluded from coverage under the exclusion, and Farmers was ordered to pay Allstate $12,500 for Allstate's contribution to the settlement of Bethune's claim.

Farmers appealed to the U.S. Court of Appeals. Finding no controlling Nebraska precedent, the court of appeals certified the following two questions to this court:

> (1) Under Nebraska law, does the Farmers Mutual household exclusion by its terms exclude liability coverage for bodily injury to the named insured when those injuries are caused by the negligence of a permissive operator?
>
> (2) If coverage is excluded by the policy terms, may the exclusion be enforced under Nebraska law?

There is no issue of fact because the parties submitted the case to the district court upon an agreed statement of facts.

The policy issued by Farmers to Bethune contained the following language:

> Coverages A and B - (A) Bodily Injury Liability and (B) Property Damage Liability.
>
> (1) To pay on behalf of any insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury sustained by other persons . . . arising out of the ownership, maintenance or use, including loading or unloading of the owned automobile. . .
>
> . . . .
>
> EXCLUSIONS-INSURING AGREEMENTS I AND II
>
> This insurance does not apply under:
>
> . . . .
>
> (i) coverage A, to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured. . .
>
> DEFINITIONS - INSURING AGREEMENTS I AND II.
>
> Insured- Under coverages A, B and C the unqualified

> word "insured" includes
>
> (1) the named insured, and
>
> . . . .
>
> (4) any other person while using the owned automobile, provided the operation and the actual use of such automobile are with the permission of the named insured or such spouse and are within the scope of such permission. . . .

The answer to the first question is found by applying the language of the policy issued by the defendant to the facts of the case in accordance with the following rules.

An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976). Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning. *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988); *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 401 N.W.2d 160 (1987); *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985); *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 381 N.W.2d 117 (1986); *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986); *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982); *Rodriguez v. Government Employees Ins. Co.*, 210 Neb. 195, 313 N.W.2d 642 (1981). An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. *Lumbard v. Western Fire Ins. Co., supra*; *Rodriguez v. Government Employees Ins. Co., supra*. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Waylett v. United Servs. Auto. Assn., supra*; *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985); *Pettid v. Edwards, supra*; *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982); *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456

(1984); *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 281 N.W.2d 539 (1979).

Contrary to the contention of the plaintiff, Allstate, we find the language of the policy issued by the defendant to be clear. As such, it should be given its plain and ordinary meaning.

The exclusion provides that the unqualified word "insured" includes the named insured, who is Bethune. Thus, although Miller was otherwise an "insured" under the policy, the exclusion specifically excludes coverage for the liability of Miller to Bethune for bodily injury. The finding of the U.S. District Court to the contrary was erroneous. The answer to the first question is yes.

The answer to the second question depends upon whether there is any statute or public policy in Nebraska that prevents the policy issued by the defendant from being enforced according to its plain and ordinary meaning.

The plaintiff concedes that the 1985 amendment to Neb. Rev. Stat. § 60-302 (Reissue 1988) requiring proof of financial responsibility for registration of a motor vehicle was not in effect on the date of the accident in this case. We have previously held that the Nebraska financial responsibility act has no application to an insurance policy that has not been used as proof of financial responsibility in the future. *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967).

Although the courts in other jurisdictions that have considered the question of whether such an exclusion is contrary to public policy have reached different conclusions, see Annot., 52 A.L.R.4th 18 (1987), we find that the exclusion involved in this case is not contrary to the public policy of this state upon the facts of this case.

In *Allstate Insurance Company v. Boles*, 587 F. Supp. 807 (S.D. Ind. 1984), the plaintiff had commenced an action for a declaratory judgment to determine whether the household exclusion in a policy that it had issued was valid. The accident involved in that case occurred when the named insured was operating the automobile in which his wife was a passenger. The issue was whether the language of the policy excluded coverage for the liability of the named insured for the injuries to his wife. The court held that although the doctrine of interspousal

immunity had been abrogated in Indiana in 1972, the exclusion in the policy issued by the plaintiff was not contrary to the public policy of Indiana. The court stated:

> The citations to the Court of Appeals of Indiana reflect the well-established judicial support for allowing parties to insurance contracts to determine what risks are to be afforded coverage in a particular transaction. In the absence of statutory requirements, Indiana courts have been reluctant to assume legislative power and require that particular types of insurance coverage be purchased. Likewise, the Courts have often refused to provide coverage that was clearly not intended to be purchased by the insured or provided by the insurer. The Supreme Court of Indiana would not characterize the household exclusion clause now before this Court as contrary to public policy, and therefore invalid, because to do so would contravene the well-established rule of law that where the terms of an insurance contract are clear and unambiguous the parties are bound by those terms. Furthermore, the household exclusion clause does not contravene a positive statute.
>
> . . . .
>
> . . . Just as a woman that is married may contract to sell or purchase real estate, for example, she may contract for insurance protection. To conclude that the Supreme Court of Indiana intended to force husbands to purchase insurance protection for their wives would thus be contrary to both statutory and the well-established rule of law that a female spouse is no longer chattel of her husband. And, it would be contrary to the very nature of the Court's decision: married women have individual rights separate from their spouses. "The right to sue a spouse for injuries caused by that spouse is an entirely separate matter from the contractual obligation of an insurance company to pay for those injuries." *Porter v. Farmers Insurance Co.*, 102 Idaho 132, 627 P.2d 311, 315 (1981).

Allstate Insurance Company, supra at 812-13.

Later in the same case, upon certification of a question of

state law from the U.S. Court of Appeals for the Seventh Circuit, the Indiana Supreme Court reached the same result. In *Allstate Insurance Company v. Boles*, 481 N.E.2d 1096, 1098-99, 1101 (Ind. 1985), the court said:

> This Court is of the opinion that the insurance policy provision commonly referred to as the "household exclusion clause" does not contravene any public policy of Indiana, explicitly or implicitly expressed in case or statutory law. Accordingly, the household exclusion clause in insurance contracts are [sic] valid and enforceable such that it may preclude liability coverage of injuries sustained by the spouse of an insured.
>
> . . . .
>
> . . . We are now confronted with whether the right of a spouse to sue another spouse in tort should supercede the latter spouse's right to freely contract with an insurance company. We think not and agree with the following rationale stated by the Idaho Supreme Court in *Porter v. Farmers Insurance Co.*, (1981) 102 Idaho 132, 627 P.2d 311, when that Court was confronted with this same issue:
>
> "The right to sue a spouse for injuries caused by that spouse is an entirely separate matter from the contractual obligation of an insurance company to pay for those injuries."
>
> . . . .
>
> Whenever a court considers invalidating a contract on public policy grounds, it must always weigh in the balance the parties' freedom to contract. Although special rules of construction of insurance contracts have been developed due to the disparity in bargaining power between insurers and the insured's [sic], if a contract is clear and unambiguous, the language therein must be given its plain meaning. *Vernon Fire and Casualty Co. v. American Underwriters, Inc.*, (1976) 171 Ind. App. 309, 356 N.E.2d 693. The household exclusion clause is clear and unambiguous. Further, as seen in our analysis, it does not contravene public policy reflected in our case law or motor vehicle statutes. Accordingly, our answer to the certified question is that a household exclusion provision

> of an automobile insurance policy is not contrary to public policy of Indiana, as expressed in statute or case law, when applied to preclude liability coverage of injuries sustained by the spouse of an insured.

See, also, *Porter v. Farmers Ins. Co. of Idaho*, 102 Idaho 132, 627 P.2d 311 (1981); *Walker v. American Family Mut. Ins. Co.*, 340 N.W.2d 599 (Iowa 1983); 12 G. Couch, Cyclopedia of Insurance Law, §§ 45:486-87 (rev. 2d ed. 1981); 6C J. & J. Appleman, Insurance Law and Practice, § 4409 (R. Buckley ed. 1979).

For the reasons stated, the answer to the second question is also yes.

JUDGMENT ENTERED.

WHITE, J., dissenting.

The Farmers' policy use of the imprecise term "insured" interchangeably with the exact term "named insured" has compounded the difficulties inherent in attempting any rational understanding of the meaning of the classic example of legal obfuscation, the American automobile liability insurance contract.

Having created this tangle, Farmers urges us to apply the most restrictive possible meaning to the document. The majority dutifully complies.

That the document is ambiguous, I submit, is obvious; therefore, the meaning most favorable to the policyholder should be adopted.

I dissent.

CONNEE L. YUSTEN, APPELLEE, V. CY R. YUSTEN, APPELLANT.
444 N.W.2d 681

Filed August 25, 1989. No. 89-043.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

James R. Wefso, of Crites, Shaffer, Connealy, Watson & Wefso, for appellant.

Michael V. Smith, of Smith and King, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Cy R. Yusten appeals the award of alimony to his ex-wife, Connee L. Yusten.

As required in cases of this nature, we have reviewed the record de novo to determine whether the district court abused its discretion in the alimony award. *Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986).

Upon a de novo review of this case, we find no patent unfairness in the alimony award. Therefore, there was no abuse of discretion by the trial court, and its decree should be affirmed.

Each party shall pay his or her own costs and attorney fees in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. STEVEN M. BENTSON, RESPONDENT.

444 N.W.2d 681

Filed August 25, 1989. No. 89-748.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), the respondent, Steven M. Bentson, filed a voluntary surrender of license with this court.

A disciplinary complaint was filed against Bentson with the Counsel for Discipline of the Nebraska State Bar Association. The respondent admits that he knowingly violated Canon 1,

DR 1-102(A)(1), (4), (5), and (6), of the Code of Professional Responsibility. He also freely and voluntarily waives all proceedings against him in connection with the pending disciplinary complaint.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STEPHANIE WRIGHT, APPELLANT, V. GLEN FORNEY ET AL., APPELLEES.

444 N.W.2d 895

Filed September 1, 1989. No. 87-220.

1. **Trial: Evidence.** The admission or exclusion of evidence is initially left to the discretion of the trial court, which must determine the relevancy and possible prejudicial effects of the proffered evidence.
2. _____: _____. Rebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Michael J. Javoronok, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., and Tamara M. Haas, of Collins, Ribble, Meyer & Wood, for appellant.

William P. Mueller and Rita C. Grimm, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., and William M. Lamson, Jr., and Patricia A. Zieg, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITEHEAD, D.J.

The plaintiff, Stephanie Wright, appeals from a jury verdict for the defendants, Glen Forney and Gerhard Schmitz, individually and doing business as Scottsbluff Surgical

Associates, and West Nebraska General Hospital. The issue presented on appeal is whether or not the district court committed error in refusing the introduction of rebuttal evidence offered by the plaintiff.

In the abbreviated record presented to the court, it appears the facts are that the appellant was treated by the appellee Glen Forney, M.D. On January 31, 1983, Forney performed a loop gastrojejunostomy on the appellant, who was an obese person. The procedure is designed to create a stomach with a very small capacity. The small stomach pouch is created by stapling off a substantial portion of the patient's stomach. The small intestine is then attached to the newly created stomach pouch, with a small opening connecting the two. The newly created stomach has only a very limited capacity and empties quite slowly. The result is weight loss.

Following the surgery, the appellant's hospital course of recovery was essentially normal. From the beginning, she had nausea and difficulty keeping liquids down, but this was not abnormal for people having this type of surgery. It appeared she was making steady improvement until the evening of February 8, when she began vomiting more substantial amounts of green liquid, at which time the appellee Forney ordered that she be given nothing by mouth and that x rays of the upper gastrointestinal tract be taken the morning of February 9.

Before these procedures could be performed, the appellant experienced cardiopulmonary arrest in the early morning of February 9. It appears that a leak had occurred, allowing the stomach contents to spill into the peritoneum (the sac surrounding the intestines). These contents contaminated the abdomen, and peritonitis developed. The appellant developed a very rapid pulse, a drop in blood pressure, and a high temperature. She apparently breathed vomit into her lungs and went into cardiac arrest. At that point, appropriate measures were taken to revive the appellant and deal with the crisis, and her life was saved.

At the conclusion of the defendants' case, the appellant requested that Dr. Roy Cohn, who testified in the appellant's case and had returned to California, be deposed over the phone to offer evidence in rebuttal testimony to the appellees' experts.

Appellant suggested that Cohn be put under oath in California and the testimony be transcribed in Gering, Nebraska. As an alternative, the appellant's counsel requested that the audiotape of the deposition be played. Over objections of the appellees, the court ordered the deposition be taken, but did not rule at the time whether it would be permitted to be presented to the jury. After reading the telephonic deposition, the court refused the offer of the rebuttal testimony.

The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion. The admission or exclusion of evidence is initially left to the discretion of the trial court, which must determine the relevancy and possible prejudicial effects of the proffered evidence. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982). Rebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party. *Cromer v. Farmland Service Coop, Inc.*, 198 Neb. 355, 252 N.W.2d 635 (1977); *McClellan v. Hein*, 56 Neb. 600, 77 N.W. 120 (1898). Rebuttal is not intended to give a party an opportunity to tell his story twice or to present evidence that was proper in his case in chief.

From a search of the record, we conclude that the evidence offered was cumulative and not proper rebuttal; its admission was directed to the discretion of the trial court; and there was no abuse of discretion. See, *Nusz v. Wells Mfg. Corp.*, 214 Neb. 1, 332 N.W.2d 204 (1983); *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977); Neb. Rev. Stat. §§ 27-401 and 27-402 (Reissue 1985).

AFFIRMED.

PATRICIA J. HALLAN, APPELLEE, V. RICHARD HALLAN, APPELLANT.
444 N.W.2d 896

Filed September 1, 1989. No. 87-336.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Steven H. Heldt, of Smith, Smith & Heldt, for appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

PER CURIAM.

In this dissolution of marriage case, respondent husband appeals from the trial court's division of property, asserting insufficiency of the interest awarded him in his wife's retirement funds and objecting to the trial court's inclusion as a marital asset of a portion of a settlement he received from an action he had filed against a former employer, following his sixth and final involuntary termination of employment.

The ultimate test in determining the appropriateness of the division of property is reasonableness as determined by the facts in each case. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987). We have reviewed the record de novo as we are required to do, and we have determined that the trial court did not abuse its discretion with regard to either of the matters of which complaint is made. The decree of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ROBERT M. SPIRE, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY ET AL., APPELLEES.

445 N.W.2d 284

Filed September 1, 1989. No. 87-425.

1. **Declaratory Judgments: Judicial Construction: Statutes.** A declaratory judgment action, pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute.
2. **Declaratory Judgments.** In a declaratory judgment action involving the determination of factual issues, such issues may be tried and determined as in other civil actions.
3. **Declaratory Judgments: Appeal and Error.** In appellate review of an action for a declaratory judgment in a law action, factual findings by the trier of fact will not be set aside unless the findings are clearly erroneous.
4. **Declaratory Judgments: Equity: Appeal and Error.** In appellate review of an action for declaratory judgment in an equity action, the standard of review for an equity case applies.
5. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
6. **Equity: Appeal and Error.** In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
7. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional.
8. **Constitutional Law: Public Service Commission: Jurisdiction: Legislature.** Although the Public Service Commission is an independent regulatory body under the Nebraska Constitution, Public Service Commission jurisdiction to regulate common carriers may be restricted by the Legislature through "specific legislation." Neb. Const. art. IV, § 20.
9. _____: _____: _____: _____. The Legislature cannot constitutionally divest the Public Service Commission of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, except the Legislature, with control over the class of common carriers.
10. _____: _____: _____: _____. A legislative act or statute may constitutionally divest the Public Service Commission of jurisdiction over common carriers to the extent that the Legislature, through specific legislation, has preempted the

Public Service Commission in control of common carriers.

11. _____: _____: _____: _____. While the Legislature may constitutionally occupy a regulatory field, thereby specifically and preemptively excluding the Public Service Commission from some control over a class of common carriers, the Legislature cannot absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers.
12. **Constitutional Law: Property: Due Proces.** A ratepayer's right to a fair and reasonable rate is a property entitlement protected by the due process clauses of the U.S. and Nebraska Constitutions.
13. **Constitutional Law: Due Process: Notice.** Only governmental decisions adjudicative in nature are subject to the procedural due process requirement of notice and hearing; legislative action is exempt from the constitutional protection of procedural due process.
14. **Constitutional Law: Property: Due Process: Notice: States.** Where the state grants its citizens a statutory right to notice and hearing on a matter or in a proceeding, the state, in making legislative determinations affecting a citizen's property right, must adhere to a procedure which comports with the requirements of the due process clauses of the U.S. and Nebraska Constitutions.
15. **Constitutional Law: Statutes.** When a fundamental right or suspect classification is not involved in legislation, a legislative act is a valid exercise of a state's police power if the act is reasonably related to a legitimate governmental interest.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Robert M. Spire, Attorney General, John R. Thompson, Dale A. Comer, and L. Jay Bartel for appellant.

J. Taylor Greer, Bert L. Overcash, and Paul M. Schudel, of Woods, Aitken, Smith, Greer, Overcash and Spangler; Harold L. Rock, David A. Jacobson, Maureen E. McGrath, and Nancy L. Dickhute, of Kutak Rock & Campbell; Richard A. Peterson, of Peterson Nelson Johanns Morris & Holdeman; and Mark E. Belmont for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and ENDACOTT, D.J.

SHANAHAN, J.

The Attorney General of the State of Nebraska, as relator, brought a declaratory judgment action in the district court for Lancaster County to have 1986 Neb. Laws, L.B. 835 (the act), now codified as Neb. Rev. Stat. §§ 86-801 et seq. (Reissue 1987), declared unconstitutional on a number of grounds. The

respondents, Northwestern Bell Telephone Company (NWB), Lincoln Telephone and Telegraph Company (LT&T), and AT&T Communications of the Midwest, Inc. (AT&T), which have litigable interests in the validity of the challenged act, contended that L.B. 835 was constitutional in all the provisions challenged by the Attorney General. The district court declared that L.B. 835 is "valid, constitutional, validly enacted and of lawful force and effect."

The Attorney General appeals, assigning as error the district court's (1) failure to hold that L.B. 835 unconstitutionally divests the Nebraska Public Service Commission (PSC) of its regulatory authority, granted in Neb. Const. art. IV, § 20, over telecommunications companies; (2) erroneous conclusion that L.B. 835 constituted valid "specific legislation" under Neb. Const. art. IV, § 20; (3) erroneous conclusion that telephone subscribers are not entitled to procedural due process in connection with telephone rate review proceedings conducted pursuant to L.B. 835; (4) erroneous conclusion that L.B. 835 contains adequate due process safeguards for telephone subscribers, assuming that subscribers are entitled to such protection; and (5) erroneous conclusion that the legislatively expressed goals of L.B. 835 may be fulfilled as a valid exercise of the state's police power.

STANDARD OF REVIEW

A declaratory judgment action, pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute. *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986).

In a declaratory judgment action involving the determination of factual issues, such issues may be tried and determined as in other civil actions. § 25-21,157; *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*, 226 Neb. 50, 409 N.W.2d 574 (1987). In appellate review of an action for a declaratory judgment in a law action, factual findings by the trier of fact will not be set aside unless such findings are clearly erroneous. *Heimbouch v. Victorio Ins. Serv., Inc.*, 220 Neb.

279, 369 N.W.2d 620 (1985). In appellate review of an action for declaratory judgment in an equity action, the standard of review for an equity case applies. *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *County of York v. Johnson*, 230 Neb. 403, 432 N.W.2d 215 (1988).

A declaratory judgment that L.B. 835 is unconstitutional might be a basis for injunctive relief against enforcement of the act and, unrelated to a claim for damages, is more akin to relief through an equity action rather than relief through a law action. Cf. *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987) (action for a declaratory judgment that a statute was unconstitutional and for an injunction against enforcement of the unconstitutional statute). Consequently, in the present appeal we apply the standard for review of an equity appeal:

> "In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another."

Frenzen v. Taylor, 232 Neb. 41, 42, 439 N.W.2d 473, 474-75 (1989).

One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988); *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984).

ACRONYMS AND TELEJARGON

As the result of *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd* 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983), divestiture of AT&T caused dramatic changes in the telecommunications industry. The

nation was divided into telephone service geographic areas called LATAs, an acronym for "Local Access and Transport Areas." The Bell operating companies, such as NWB, became subsidiaries of a regional holding company. Each holding company, through its subsidiaries, was allowed to provide only local exchange service by nontoll local calls or "POTS" ("Plain Old Telephone Service"), intraLATA toll service (long-distance toll calls to areas within a customer's LATA), exchange access service (customer access to long-distance carriers allowed for LATA to LATA, or "interLATA," service), and directory services. AT&T was free to enter and compete in all markets and, in fact, was granted authority by the PSC to serve Nebraska as an intrastate interLATA long-distance carrier.

Nebraska was divided into three LATAs—one LATA centered around Omaha, another around Lincoln, and the third LATA encompassed the balance of Nebraska.

BACKGROUND FOR L.B. 835

The Federal Communications Commission controls interstate interexchange long-distance service. Consequently, before L.B. 835, the PSC controlled three basic types of telecommunications in Nebraska: (1) local exchange service, or "POTS"; (2) intraLATA interexchange service (toll calls within the LATA from exchange to exchange); and (3) intrastate interLATA service (toll calls within the state from LATA to LATA). Before L.B. 835, the PSC had authority to approve telephone rates submitted by applications from telecommunications companies, to control entry into and exit from the market by a telecommunications supplier, and to control the quality of service provided by telecommunications companies.

In 1985, the Legislature commissioned the Arthur Andersen Accounting firm to prepare a survey of the telecommunications industry in Nebraska. Andersen's "major observations" were reflected in the "Executive Summary" of its report:

> [1.] Further competition within the telecommunications industry in Nebraska is inevitable. . . .
>
> [2.] The main influence behind increased competition is technology. . . .

> [3.] Based on historical activity, it appears that further changes in the industry and the technologies which support the industry will be at least as rapid and dramatic as changes in the last decade. . . .
>
> [4.] Under the present regulatory framework and pricing structure, bypass of the traditional telephone system is likely to continue and may accelerate as technology advances and competition increases. . . .
>
> [5.] As the industry changes and competition increases, the shifting of revenues may create difficulties for some service providers and opportunities for others. . . .
>
> [6.] The pricing of telephone services has undergone changes and will continue to change.

Andersen's report expressed concern over a recently developing telecommunications phenomenon known as "bypass," when a current customer forgoes service by a local or long-distance telephone company and obtains service through facilities of another company. A microwave system is an illustration of technology which may be involved in a bypass. If a customer, motivated by economic incentive based on the customer's substantial requirements for telephone service, elects to bypass the customer's telephone company, the bypassed company's other customers will pay higher rates "to help support the [bypassed] system's fixed costs" because there are fewer customers.

THE ACT: L.B. 835

In response to the concerns expressed in Andersen's report and by the telecommunications industry, the Legislature, after much debate, enacted L.B. 835.

Statutory Objectives of L.B. 835

Section 1 of L.B. 835 (§ 86-801)

> declares that it is the policy of the state to:
>
> (1) Preserve affordable telecommunications services;
>
> (2) Maintain and advance the efficiency and availability of telecommunications services;
>
> (3) Ensure that consumers pay only reasonable charges for telecommunications services; and
>
> (4) Promote diversity in the supply of telecommuni-

cations services and products throughout the state.

PSC's Regulatory Power

Section 3, subsection (1), of L.B. 835 (§ 86-803(1)) concerns the scope of PSC regulation over telecommunications companies:

> Except as provided in sections 1 to 11 of this act, telecommunications companies shall be subject to regulation by the commission [PSC]. Telecommunications companies shall not, however, be subject to any rate regulation by the commission and shall not be subject to provisions as to rates and charges prescribed in Chapter 75, articles 1 and 6. Telecommunications companies shall, instead, file rate lists for their telecommunications services which shall be effective after ten days' notice to the commission with the exception of monthly rates for basic local exchange services.

Thus, for intraLATA interexchange and interLATA service, rates submitted to the PSC become effective after 10 days, and, as the result of L.B. 835, the PSC has no power to review those rates.

PSC Rate Authority over "POTS"

Section 3, subsection (2), of L.B. 835 (§ 86-803(2)) allows telecommunications companies to change local exchange rates only after 60 days' notice to subscribers affected by the rate change. The requisite notice to customers must include:

> (a) the reasons for the rate increase, (b) a description of the affected service, (c) an explanation of the right of the subscriber to petition the commission for a public hearing on the rate increase, (d) a list of exchanges which are affected by the proposed rate increase, and (e) the dates, times, and places for the public informational meetings required by this section.

L.B. 835 substantially changed the previous PSC regulatory scheme by restricting the situations in which the PSC was empowered to review reasonableness of certain rates charged by telephone companies. Under L.B. 835, the PSC has power to review rates for basic local exchange service only (1) when a complaint, signed by a specified percentage of subscribers

(from 2 percent to 5 percent, depending on the number of subscribers affected by the rate in question), is filed within 60 days after notice has been sent to the subscribers, and (2) on PSC's own motion if a telecommunications company has increased basic local exchange rates by more than 10 percent in any 12-month period. L.B. 835, § 3(3) and (7) (§ 86-803(3) and (7)). Under both rate review procedures, the PSC must hold a hearing within 90 days after (1) the subscribers' complaint has been filed (customer-instigated review) or (2) notice to the telecommunications company (PSC-initiated review), and determine whether the proposed rates are "fair, just, and reasonable." Within 60 days after the hearing, the PSC may enter "an order adjusting the rates and charges at issue, except that the [PSC] may not set any rate or charge below the actual cost of providing such service . . . ." L.B. 835, § 3(7). If the PSC fails to issue an order within 60 days after the hearing, the rates placed in effect by the telecommunications company are deemed approved. L.B. 835's provision for customer-initiated rate review by the PSC terminates August 31, 1991.

Company-Initiated Review

A telecommunications company may file an application with the PSC and request the PSC to prescribe fair and reasonable rates for the company. L.B. 835, § 3(4) (§ 83-803(4)).

Quality of Service

Subsection (6) of § 3 in L.B. 835 provides that the PSC "shall retain quality of service regulation over the services provided by all telecommunications companies . . . ." § 86-803(6).

Change in Rates Set by PSC

In L.B. 835, subsection (10) of § 3 provides: "No telecommunications company may change its basic local exchange rate within ninety days after entry of a final order adjusting such rate pursuant to subsections (3), (4), and (7) of this section." § 86-803(10).

Monitoring by PSC; Annual Report to Legislature

Section 4 (§ 86-804) of the act pertains to the PSC's continued monitoring of the telecommunications industry:

The commission shall provide the Legislature with an

annual report on or before January 5 of each year on the status of the Nebraska telecommunications industry. The report shall describe: (1) The quality of telecommunications services being provided to the citizens of Nebraska; (2) the availability of diverse and affordable telecommunications services to all of the people of Nebraska; and (3) the level of rates of local exchange companies and interexchange telecommunications companies. The report shall also address the question of the need for further legislation to achieve the purposes of sections 1 to 11 of this act.

PSC Control over Entry into the Market; Record Keeping

Section 5 of L.B. 835 (§ 86-805) authorizes the PSC to issue a certificate to a telecommunications company for interLATA interexchange service within Nebraska and to deny certification to any telecommunications company which:

(a) Does not provide the information required by the commission;

(b) Fails to provide a performance bond, if required;

(c) Does not possess adequate financial resources to provide the proposed service; or

(d) Does not possess adequate technical competency to provide the proposed service.

Section 7 of the act (§ 86-807) provides:

(1) Except for requirements established by statute, the commission may limit, remove, or waive regulatory requirements for telecommunications companies when it determines that competition will serve the same purposes as public interest regulation. The commission may revoke any waivers it grants or reinstate regulations if such revocation or reinstatement would protect the public interest upon a finding that the telecommunications company is restricting market output, impairing customer interest, or engaging in unlawful anticompetitive activity.

(2) A telecommunications company shall at a minimum:

(a) Keep its accounts according to rules and regulations adopted and promulgated by the commission;

(b) File financial reports with the commission as required by and in a form and at times prescribed by the commission;

(c) Keep on file at the commission such current price lists and service standards as the commission may require; and

(d) Cooperate with commission investigations of customer complaints.

Nonregulated Activities

Section 8 of the act (§ 86-808) exempts "[o]ne-way broadcast or cable television transmission of television or radio signals," mobile radio service, radio paging service, and cellular services from regulation by the PSC.

Actions Against Telecommunications Companies

Section 11 of L.B. 835 (§ 86-811) allows "any interested person" to file an action in the district court concerning a telecommunications company's alleged violation of L.B. 835. If the company has violated the act, "the court may issue an injunction or other proper process to restrain the telecommunications company . . . from continuing such violation and may order additional relief."

Severability

Section 16 of the act provides: "If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof."

L.B. 835'S ECONOMIC IMPACT ACCORDING TO EXPERTS

Conflicting testimony from two experts in telecommunications economics was the focal point of the declaratory judgment action. Dr. Walter Bolter, a certified public accountant and engineer, who also holds a Ph.D. in economics, expressing his opinion whether L.B. 835 advanced the four goals listed in the statute's "policy statement," testified that the act would neither preserve affordable telecommunications service in Nebraska nor advance efficiency and availability of telecommunications service. Dr. Bolter based his opinion on the

"very monopolistic" state of the telecommunications industry in Nebraska, which, coupled with PSC's diminished power to regulate rates and L.B. 835's barriers for entry into the marketplace, accorded telecommunications companies an unrestricted ability to raise rates. In essence, Dr. Bolter questioned the wisdom of leaving price control to market forces when, in his view, such forces were too insignificant to exert any influence on the major telecommunications companies.

Dr. Bolter further testified that under L.B. 835, consumers would "only by happenstance" pay reasonable rates for their telecommunications services. Once again, Dr. Bolter based his opinion on the absence of market forces as a substitute for regulation and control of prices for telecommunications. Finally, Dr. Bolter testified that he did not believe that L.B. 835 would "promote diversity in the supply of telecommunications services and products" in view of a new supplier's difficulty which would be experienced in entering and competing within the telecommunications industry. Dr. Bolter also testified about the condition of competition in three areas of the telephone market: interLATA; intraLATA interexchange; and intraLATA local exchange, or "POTS." Despite the presence of other interLATA suppliers, AT&T's dominance prevented competition in the interLATA market. The intraLATA interexchange market is much more concentrated than the interLATA market and is, therefore, more vulnerable to "price leadership" by a large, monopolistic supplier. Dr. Bolter noted, however, that the PSC had received applications from new entrants into the intraLATA market—applicants which could provide some competition to existing suppliers. Although there have been no applications for local telephone service by new entrants which could compete with existing suppliers, some technological developments, such as private microwave systems and cellular phones, may provide customers with local exchange service. According to Dr. Bolter, statistics regarding revenues lost by major telecommunications companies as the result of bypass are "very sketchy."

John Vondras, executive assistant to the president of NWB and a NWB employee for 16 years, testified regarding "bypass," the most significant form of competition

confronting NWB. Bypass occurs when a customer of NWB, AT&T, or LT&T uses another company's facilities to complete a telephone call. In a study of NWB's 149 largest customers, NWB determined that 140 customers had a volume and pattern of telecommunications usage which made bypass economically attractive. According to Vondras, NWB's study revealed that bypass could result in lost revenue of $27 million for NWB. Vondras testified that on account of a number of technological advances during the past few years, NWB faces competition in the local exchange market.

Dr. Frank Alessio, who has a Ph.D. in economics and is a lecturer in the public utilities program at Stanford University, performed his own analysis of the telecommunications industry's condition in Nebraska. Dr. Alessio focused on "revenue vulnerability," a telephone company's traditional revenue which a new competitor might be able to "pick off." Dr. Alessio testified that because high-volume customers in both Omaha and Lincoln were clustered in relatively small geographic areas, a new entrant into the market could easily obtain a substantial volume of business without incurring inordinately high costs for entering the market. Based on his analysis, Dr. Alessio concluded that the telecommunications market in Nebraska was "technically contestable, rivalrous and workably competitive."

Referring to L.B. 835, Dr. Alessio testified that as a result of changes in technology and customer needs, "traditional public utility regulation is no longer workable in the current environment in telecommunications." Dr. Alessio characterized L.B. 835 as "a refreshingly realistic view of what regulator oversight needs to be in the dynamic market time we are seeing." Regarding L.B. 835's policy statement, Dr. Alessio disagreed with Dr. Bolter's opinion that customers would pay reasonable telephone rates only by happenstance. According to Dr. Alessio, to preserve affordable telephone rates for consumers, existing telecommunications companies needed competitive freedom which was unobtainable under previous telephone regulation by the State of Nebraska. Dr. Alessio also expressed his belief that L.B. 835 will foster diversity in telecommunications service, may encourage new competitors

to enter the market, and will advance availability and efficiency in telecommunications services throughout Nebraska.

CONSTITUTIONAL AUTHORITY OF THE PSC

The Attorney General's first two assignments of error relate to the application of Neb. Const. art. IV, § 20, which outlines the constitutional authority of the PSC:

> The powers and duties of such commission [the PSC] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

The Attorney General claims that L.B. 835 unconstitutionally divests the PSC of its authority to regulate rates because the act does not constitute "specific legislation" by which the Legislature may restrict the authority exercisable by the PSC.

PSC authority over telephone companies is rooted in legislative, judicial, and electoral activities during the early 1900s. In the election of November 6, 1906, the forerunner of Neb. Const. art. IV, § 20, was added by amendment to the state Constitution, an amendment which created the "State Railway Commission" with authority to regulate "common carriers." Comp. Stat. § 421a (1909). In 1907, the Legislature enacted statutes "creating and defining the Powers, Duties and Qualifications of the State Railway Commission" and which included telephone companies within the definition of "common carriers." Rev. Stat. § 6124 (1913). See, also, *Marquis v. Polk County Telephone Co.*, 100 Neb. 140, 144, 158 N.W. 927, 928 (1916): "[B]y section 6124, Rev. St. 1913, the term 'common carrier' is expressly made to include telephone companies." PSC control over rates and service of telephone companies has been repeatedly recognized by this court. See, *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N.W. 674 (1914); *Marquis v. Polk County Telephone Co., supra*; *Farmers & Merchants Telephone Co. v. Orleans Community Club*, 116 Neb. 633, 218 N.W. 583 (1928); *Block v. Lincoln Tel. & Tel. Co.*, 170 Neb. 531, 534, 103 N.W.2d 312, 314-15 (1960) ("Within the meaning of the Constitution

telephone companies are common carriers").

Before the constitutional amendment establishing the PSC, the Legislature was the sole repository for control over telephone company rates. The constitutional amendments of 1906 and 1907 extended to the PSC the regulatory power which was previously exercisable only by the Legislature. *Marquis v. Polk County Telephone Co., supra.*

> Briefly stated, the railway commission [PSC] is created by section 20, article IV, of the Constitution. It is granted powers and duties which include the regulation of rates, service, and general control of common carriers as directed by the Legislature. In a field where the Legislature has not acted, the commission is authorized to exercise the powers and perform the duties enumerated in the constitutional provision. This means, of course, that the Legislature may properly enact specific legislation limiting the scope of the commission's powers.

Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 283, 34 N.W.2d 363, 365 (1948). See, also, *State, ex rel. Missouri P. R. Co., v. Clarke*, 98 Neb. 566, 153 N.W. 623 (1915); *In re Lincoln Traction Co.*, 103 Neb. 229, 171 N.W. 192 (1919); *Blackledge v. Farmers Independent Telephone Co.*, 105 Neb. 713, 181 N.W. 709 (1921); *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 25 N.W.2d 824 (1947); *Dahlsten v. Harris*, 191 Neb. 714, 217 N.W.2d 813 (1974). As a result of specific legislative action,

> the Legislature has the right by law to prescribe how the commission shall proceed and what authority it may exercise in the regulation and general control of common carriers. Therefore, when specific legislation is enacted upon a subject in relation thereto, such legislation preempts the field so occupied and thereby prescribes and controls the powers and duties of the commission.

Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 653, 28 N.W.2d 396, 400 (1947). See, also, *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 337, 37 N.W.2d 502, 506 (1949) ("The commission [PSC] is a regulatory body of constitutional origin not amenable to legislative interruption or limitation of its status or powers

except by specific legislation . . ."). Although the PSC is an independent regulatory body under the Nebraska Constitution, PSC jurisdiction to regulate common carriers may be restricted by the Legislature through "specific legislation." Neb. Const. art. IV, § 20.

L.B. 835 undoubtedly restricts the PSC's power. For that reason, under Neb. Const. art. IV, § 20, validity of L.B. 835 turns on the question whether the act constitutes "general" or "specific" legislation. As noted in *State ex rel. State Railway Commission v. Ramsey, supra*:

> The right to regulate "as" the Legislature may provide means the right to regulate in the manner in which the Legislature provides. . . . The word "specific" in the phrase "in the absence of specific legislation" is synonymous with the word "particular." The term implies a definite restriction on the kind and extent of legislation over common carriers which is permissible by the Legislature. It [specific] is defined in 58 C. J., Specific, p. 826 as follows: "Definite, or making definite; limited or precise; precisely formulated or restricted; tending to specify or make particular. Although the term is a relative one, it is limited to a particular, definite, or precise thing, and hence is the very opposite of 'general'." It was not intended by the use of these words to authorize unlimited, broad, general legislation in reference to the control and regulation of common carriers.

Id. at 344, 37 N.W.2d at 509.

Our prior decisions regarding interpretation of Neb. Const. art. IV, § 20, seem to draw a distinction between statutes by which the Legislature attempted to transfer regulation of common carriers to an agency distinct from the PSC and statutes by which the Legislature itself "occupies the field" and becomes, in effect, the regulatory body which exercises control over common carriers. The Legislature cannot constitutionally divest the PSC of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, except the Legislature, with control over the class of common carriers. *State ex rel. State Railway Commission v. Ramsey, supra* (unconstitutional legislative

attempt to vest the Nebraska Department of Aeronautics with power to "control common carriers by air"); *Rivett Lumber & Coal Co. v. Chicago & N. W. R. Co.*, 102 Neb. 492, 167 N.W. 570 (1918) (statute designed to produce reasonable rail service did not authorize the court to exercise control over service by a railroad as a common carrier). However, a legislative act or statute may constitutionally divest the PSC of jurisdiction over common carriers to the extent that the Legislature, through specific legislation, has preempted the PSC in control of common carriers. See, *Rodgers v. Nebraska State Railway Commission*, 134 Neb. 832, 844, 279 N.W. 800, 807 (1938) ("[T]he plenary power of the railway commission may only be curtailed or diminished where the legislature has, by specific legislation, occupied the field"); *State v. Chicago & N. W. Ry. Co., supra* at 977, 25 N.W.2d at 828 ("The legislative act under consideration clearly deprives the Nebraska State Railway Commission of any power to act to the extent that it occupies the field").

Thus, while the Legislature may constitutionally occupy a regulatory field, thereby specifically and preemptively excluding the PSC from some control over a class of common carriers, the Legislature cannot absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers. For example, legislation which directs that the PSC cannot exercise its constitutionally granted power over a particular common carrier or a class of common carriers, or which dictates that the Legislature shall not enact regulatory statutes concerning a common carrier or class of common carriers, violates Neb. Const. art. IV, § 20. If such abandonment or abolition of regulatory control were permitted, the protection afforded to Nebraska citizens by the constitutionally created and empowered PSC would cease to exist. Neb. Const. art. IV, § 20, requires that the power to regulate common carriers exist either in the PSC or the Legislature.

L.B. 835 does not totally divest the PSC of jurisdiction over telecommunications companies, completely preclude the PSC's regulation of telecommunications companies, or transfer regulatory control to a governmental agency, body of

government, or branch of government except the Legislature. Instead, L.B. 835 restricts the situations and manner in which the PSC may exercise its regulatory power over rates of telecommunications companies. Regarding basic local exchange service, L.B. 835 expressly and precisely delineates the situations and manner in which the PSC may exercise its power in relation to its duties. See L.B. 835, § 3(3) and (7) (§ 86-803(3) and (7)). Concerning intrastate toll calls, however, L.B. 835 completely divests the PSC of its regulatory control over rates. L.B. 835, § 3(1) (§ 86-803(1)). The constitutionality of these restrictions on the PSC's regulatory power depends on the characterization of the statute as either specific legislation or general legislation.

Although L.B. 835 restricts the PSC's authority over the rates set by telecommunications companies, the act leaves intact PSC control over the quality of service provided by telecommunications suppliers, and retains the PSC's power to allow entry into and exit from the marketplace. L.B. 835, § 3(6) (§ 86-803(6)); L.B. 835, §§ 5 and 6 (§§ 86-805 and 86-806). Thus, the PSC will "investigate and resolve subscriber complaints concerning quality of telecommunications service, subscriber deposits, and disconnection of service." L.B. 835, § 3(6) (§ 86-803(6)). If informal resolution of the complaint is not accomplished, the customer may file a petition with the PSC, which will then hold a hearing on the customer's complaint, and may enter an order granting such relief as the PSC deems necessary. Furthermore, the PSC is empowered to control entry into the "interLATA interexchange" market through the "certificate" process, that is, the PSC may authorize a telecommunications company which has supplied the requisite information to supply "interLATA interexchange" service. L.B. 835, § 5 (§ 86-805). The PSC also retains the power to determine whether and when a telecommunications company may abandon or discontinue service to a local exchange area. L.B. 835, § 6 (§ 86-806).

L.B. 835 further requires that the PSC report annually to the Legislature and suggest additional legislation, if any, which may accomplish the goals of the act. L.B. 835, § 4 (§ 86-804).

The Legislature has not abandoned or abolished all PSC

regulation of telecommunications companies. Rather, through L.B. 835, the Legislature has restricted or limited the regulatory power of the PSC concerning rates and has provided a means by which the system of limited rate regulation may be evaluated by the Legislature. L.B. 835, § 4 (§ 86-804). The act preserves the PSC's regulatory jurisdiction regarding quality of service and entry into the telecommunications market and, therefore, does not divest the PSC of its regulatory power over telephone companies. The provisions in L.B. 835 concerning rate review in the various telecommunications markets are specific legislation rather than general. We therefore hold that L.B. 835 constitutionally divests the PSC of rate review jurisdiction over intraLATA interexchange and interLATA intrastate telephone service, and constitutionally limits PSC rate review jurisdiction over local exchange service rates.

L.B. 835 does not violate Neb. Const. art. IV, § 20, by nullifying PSC jurisdiction over telecommunications companies. Rather, the act constitutes specific legislation prescribing the method and manner in which the PSC will exercise its regulatory activities concerning telephone companies. The district court correctly concluded, and we also conclude, that L.B. 835 is specific legislation which constitutionally restricts the PSC's regulatory power pursuant to the Nebraska Constitution.

PROCEDURAL DUE PROCESS FOR TELEPHONE SUBSCRIBERS

The Attorney General also contends that L.B. 835 unconstitutionally denies due process to telephone subscribers regarding PSC proceedings for review of a telephone company's rates and maintains that (1) the 60 days allotted for subscribers to gather signatures necessary to challenge a proposed rate is constitutionally insufficient and that (2) the 90-day period prescribed between the ratepayers' filing a complaint and the PSC's hearing does not provide adequate time for subscribers to prepare opposition to the rate proposal. See L.B. 835, § 3(3) (§ 86-803(3)).

Setting a rate for a common carrier is a legislative act. *Nebraska Limestone Producers Assn. v. All Nebraska*

Railroads, 168 Neb. 786, 97 N.W.2d 331 (1959); *Bard v. Cox Cable of Omaha, Inc.*, 226 Neb. 880, 416 N.W.2d 4 (1987). On the ground that a legislatively determined rate was "confiscatory" or "unreasonable, arbitrary and capricious," courts have invalidated rates set for a common carrier. Before 1975, only common carriers had successfully challenged rates which denied a reasonable return on investment in the carrier. See, *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970); *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975); *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986).

Beginning with *Myers, supra*, this court has recognized an apparent species of protectable property interest in ratepayers relative to common carriers. In *Myers*, Blair Telephone Company appealed from the PSC's order that the company lower its rates and partially return overcharges attributable to the company's inadequate service. The company challenged the new rate on the ground that it was "confiscatory so as to deprive the utility of property without compensation." *Myers v. Blair Tel. Co., supra* at 62, 230 N.W.2d at 195-96. The court held that the PSC cannot set a confiscatory rate applied to the common carrier and further noted:

> As a corollary thereto, however, neither should the utility be permitted to confiscate the ratepayers' fees without giving the reasonably adequate service for which those rates were set. The commission can no more permit the utility to have confiscatory rates for the service it performs than it can compel a utility to provide service without just and equitable compensation. As a matter of elemental justice, consumers of utility services are entitled to the same protection against confiscation of property or arbitrary action on the part of the utility as are the utilities.

Id. at 62, 230 N.W.2d at 196. Unfortunately, the *Myers* court did not indicate the particular constitutional or statutory right of a customer protected against a common carrier's "confiscatory" rate. The court's focus in *Myers* on confiscation of property, however, suggests that the right to a fair and reasonable rate of return may have been based on the "takings clause" of the U.S. Constitution. U.S. Const. amends. V and

XIV. See, also, Neb. Const. art. I, § 21.

The protection afforded telephone ratepayers in *Myers* was extended to natural gas customers in *Reimer v. K N Energy, Inc., supra*, when ratepayers of a natural gas company, which was the franchised supplier of natural gas for the city in which the ratepayers lived, challenged the company's imposition of a $4 per month minimum customer service charge. After the district court sustained the gas company's demurrer (subject matter jurisdiction, plaintiff's lack of capacity to maintain the suit, and failure to state a cause of action) and dismissed the action, the ratepayers appealed. In upholding jurisdiction over the dispute, this court reversed and, after citing *Myers v. Blair Tel. Co., supra,* held that

> just as the district court has the power to protect a supplier of natural gas from municipal action which deprives it of a fair, reasonable, and compensatory rate, so, too, does the district court have the power to protect a consumer of such gas from an arbitrary, unreasonable, and confiscatory rate.

Reimer v. K N Energy, Inc., supra at 145, 388 N.W.2d at 482.

In neither *Myers* nor *Reimer* did this court rely on a lack of procedural due process as the basis for a ratepayer's challenge to a common carrier's rate, but did recognize protection against a confiscatory rate notwithstanding that a ratepayer has had the opportunity to be heard in opposition to the rate set. Thus, after *Myers* and *Reimer*, the protection in Nebraska against a confiscatory rate seemed more a matter of substantive due process than procedural due process.

The only Nebraska decision involving due process concerns regarding "ratepayers' rights" is *Bard v. Cox Cable of Omaha, Inc., supra*. Cox Cable had been granted a franchise by the city to supply the city's residents with cable television services. Bard, a subscriber of cable television service, brought suit and claimed that the cable television rates set by the city, and accordingly charged by Cox Cable, were excessive. The district court sustained demurrers (subject matter jurisdiction) filed by the city and Cox Cable, and, after dismissal of the action on account of the demurrers, Bard appealed. We summarized Bard's challenge to the rates approved by the city:

> Bard further alleges, however, that Cox Cable's rates violate the due process clause of the 14th amendment to the U.S. Constitution and several provisions of the Nebraska Constitution, including the due process clause contained in article I, § 3, thereof. The constitutional argument she makes limits itself to those due process clauses, and we, therefore, likewise limit our analysis to due process concerns.
>
> Because the setting of rates for a regulated industry is a legislative act, the courts of this state lack the power to set rates. [Citation omitted.] The courts do, however, have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus *unconstitutionally take property without due process of law*. [Citations omitted.]
>
> Thus, in the absence of overriding federal law, the district court possesses subject matter jurisdiction to determine whether Cox Cable's rates are so arbitrary and unreasonable as to be confiscatory.

(Emphasis supplied.) *Bard v. Cox Cable of Omaha, Inc.*, 226 Neb. 880, 886, 416 N.W.2d 4, 8 (1987). After holding that federal law did not preclude a state court's review of Cox Cable's rates, this court analyzed the allegations in Bard's petition and concluded that the allegations

> support an inference that Cox Cable's subscribers are paying a rate which includes a charge for something that is not being delivered to them and that, to that extent, the rate is arbitrary and unreasonable such as to be confiscatory and therefore in violation of the due process clauses of the state and federal Constitutions.

226 Neb. at 889, 416 N.W.2d at 10.

In *Bard*, however, we did not definitively characterize the due process concern as procedural or substantive. The analysis in *Bard* seems to focus on the content of the legislative enactment, that is, rates set by the city, rather than the procedure by which the rates were set inasmuch as Bard's claim did not relate to an alleged lack of notice, or a denial of an adequate opportunity to oppose the rate, but did relate to an imposed rate alleged to be unreasonable and confiscatory.

Although telephone subscribers undoubtedly have the right to be free from "arbitrary, unreasonable, and confiscatory" rates when state action is required for implementation of those rates, we interpret that right as a substantive limitation on the power of the governmental entity exercising the ratesetting function. Thus, the state is not entitled to set a rate for telephone service which effectuates a taking of property without just compensation, whether the property taken belongs to a telephone company or to a subscriber. As a trio of decisions concerning "ratepayers' rights," *Myers*, *Reimer*, and *Bard* do not relate to procedural due process in rate regulation. However, by reason of those decisions, ratepayers have a legitimate claim of entitlement to reasonable rates for telecommunications service supplied to the ratepayers. See *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Thus, a ratepayer's right to a fair and reasonable rate, a right which has emerged from the decisions of this court, is properly classified as a "property" entitlement protected by the due process clauses of the U.S. and Nebraska Constitutions. See *Board of Regents v. Roth, supra*.

Our holding that ratepayers have a constitutionally cognizable property entitlement to reasonable telephone rates, when government involvement is necessary to implement those rates, resolves only the threshold issue whether the due process clause is applicable to the facts of this case. The question remains: What process is due? Before L.B. 835, our decisions made clear that the ratesetting authority of the PSC is legislative in character, which, if properly exercised, has the effect of a

statute on the subject of reasonable rates. *Nebraska Railroads of Omaha v. Nebco, Inc.*, 194 Neb. 322, 231 N.W.2d 505 (1975); *United Mineral Products Co. v. Nebraska Railroads*, 175 Neb. 285, 121 N.W.2d 492 (1963).

If the PSC's ratemaking authority remains legislative in nature after enactment of L.B. 835, customers have no due process right to notice and hearing on ratemaking as a legislative function. "There is no constitutional due process requirement of notice and hearing applicable to legislative matters." *Barnett v. Boyle*, 197 Neb. 677, 679, 250 N.W.2d 635, 637 (1977). The rationale underlying a refusal to recognize a constitutional right to notice and hearing in legislative matters was first expressed by the U.S. Supreme Court in *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915), when Justice Holmes, speaking for the Court, stated:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Accord, *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223 (1973); *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944). Only governmental decisions adjudicative in nature are subject to the procedural due process requirement of notice and hearing; legislative action is exempt from the constitutional protection of procedural due process. *Horn v. Cty. of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979).

> It is most common for the government to affect the life, liberty or property interest of a great number of people through its legislative functions. When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the

> legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees. Similarly, an administrative agency may make decisions that are of a legislative or general rulemaking character. When an agency promulgates generalized rules there is no constitutional right to a hearing for a specific individual. However when the agency makes rules that might be termed adjudicative in that they affect a very defined group of interests, then persons representing those interests should be granted some fair procedure to safeguard their life, liberty or property.

J. Nowak, R. Rotunda, & J. Young, Constitutional Law § 13.8 at 485 (3d ed. 1986). See, also, *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir. 1986) ("When the legislature enacts a law, or a state agency adopts a regulation, that affects a general class of persons, all of those persons have received procedural due process by the legislative process itself and they have no right to individual attention"). See, further, *Nolan v. Ramsey*, 597 F.2d 577 (5th Cir. 1979).

In *City of Scottsbluff v. United Tel. Co. of the West*, 171 Neb. 229, 240, 106 N.W.2d 12, 18-19 (1960), after noting the legislative nature of the PSC's ratesetting function, this court held that

> no notice to plaintiff was required to be given by the commission before it acted legislatively in permitting defendant [telephone company] to revise and amend its rate rules and regulations to permit it to collect pro rata from its subscribers within the city the occupation tax imposed by the city unless a statute specifically required notice.

Thus, before enactment of L.B. 835, a telephone subscriber had no due process right to notice and hearing regarding ratemaking because the PSC's action in setting rates was classified as a legislative function.

The Attorney General concedes that the PSC's function in ratemaking before L.B. 835 was legislative. The Attorney General contends, however, that the changes in PSC review effectuated by L.B. 835 have altered the nature of the PSC's

role in the rate regulation process. We disagree. L.B. 835 merely prescribes the situations in which the PSC will perform its ratemaking function, and does not modify the nature of the inquiry made by the PSC in rate cases before the commission. Both before and after enactment of L.B. 835, the PSC's function in ratemaking is to determine what rates are "fair, just, and reasonable." L.B. 835, § 3(3), (4), and (7) (§ 86-803(3), (4), and (7)). As a result of L.B. 835, the fact that the PSC performs its ratemaking function only in limited circumstances does not affect or change the legislative character of the PSC's power. Because a reasonable rate, determined by the PSC, affects a large number of Nebraska citizens, and not a rather limited number of specifically identifiable individuals, the PSC's activity is properly characterized as legislative. Furthermore, the PSC's determination of a reasonable rate does not resolve a past dispute between identified parties. Rather, PSC determination of a reasonable rate merely sets a rate for the future. Whether activated by the PSC itself, by a telecommunications company, or by a company's subscribers, the PSC's ratemaking power remains legislative under L.B. 835.

The Attorney General next contends that L.B. 835 grants subscribers a right to notice and hearing regarding rates, a right which must comport with the constitutional concept of due process. In *State v. Kelley*, 198 Neb. 805, 809, 255 N.W.2d 840, 843 (1977), we held that although a criminal defendant has no due process right to an appeal, "when the Nebraska Constitution grants appeal as a matter of right, the procedure afforded must accord with the federal constitutional concepts of due process." See *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (a state-granted right must be accorded due process protection). While *Kelley* and *Griffin* concerned due process in criminal matters, the principle announced in those cases seems equally compelling in civil cases. We therefore hold that where the state grants its citizens a statutory right to notice and hearing on a matter or in a proceeding, the state, in making legislative determinations affecting a citizen's property right, must adhere to a procedure which comports with the requirements of the due process clauses of the U.S. and Nebraska Constitutions.

In the present case, the due process clauses of the state and federal constitutions did not obligate the Legislature to grant telecommunications subscribers notice and hearing for a rate determination by the PSC. However, when the state conferred the right to notice and hearing regarding the ratemaking process, the Legislature was obligated to assure that such process is fundamentally fair and meaningful. The Attorney General contends that L.B. 835 offends due process by unfair time limits in the 60-day period for obtaining signatures on a petition to trigger subscriber-initiated ratemaking by the PSC and in the 90-day hearing after the subscriber's petition has been filed or a telecommunications company has filed an application for a rate increase in excess of 10 percent. See L.B. 835, § 3(3) (§ 86-803(3)).

> " ' "* * * The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it." . . .' "

Hroch v. City of Omaha, 226 Neb. 589, 591, 413 N.W.2d 287, 288 (1987) (quoting *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951)).

We believe that the procedure outlined in L.B. 835 provides an adequate opportunity for telecommunications customers to protect their property entitlement to a reasonable telecommunications rate through subscriber participation in the PSC ratemaking hearings. For the two largest telecommunications suppliers in Nebraska, namely, NWB and LT&T, the 60-day petition process for subscriber initiation of PSC review requires that customers daily obtain 115 signatures on the petition pertaining to NWB and 88 signatures on the petition pertaining to LT&T. Given the availability of potential signatories, that is, all the telecommunications subscribers affected by the proposed rate, the Attorney General has failed to demonstrate that the 60-day time limit is unreasonable in the constitutional context of due process.

Also, the Attorney General has failed to demonstrate that

the 90-day period is inadequate for preparation of ratepayer opposition to be presented at the PSC hearing. Due to the legislative nature of the PSC's ratemaking task, L.B. 835, as a matter of constitutional consideration, need not confer on ratepayers a right to present evidence or relevant information at the PSC hearing. Notwithstanding the complexity of issues frequently involved in a rate case before the PSC, the 90-day period is ostensibly sufficient for taxpayers to gather information to challenge a telephone company's proposed rate and, therefore, gives consumers a "reasonable opportunity to be heard" and present their opposition to the proposed rate. Combined with the 60-day period to gather signatures, a consumer group could have as much as 5 months to prepare for the PSC rate hearing. Furthermore, the PSC has authority to require a telecommunications company to submit its financial reports, which would undoubtedly facilitate inquiry into reasonableness of the rates proposed by the telecommunications company. In view of the PSC's role in protecting the public interest by assuring that the rates are "fair, just, and reasonable," we are unable to conclude that the 90-day period prescribed by L.B. 835 unconstitutionally deprives telecommunications subscribers of due process. Neither the U.S. Constitution nor the Nebraska Constitution requires that telecommunications subscribers be granted any additional procedural protection beyond that embodied in L.B. 835. The Attorney General's claim that L.B. 835 violates telephone subscribers' due process rights is, therefore, without merit.

L.B. 835 AND THE STATE'S POLICE POWER

The Attorney General's final contention is that L.B. 835 is unconstitutional because the act bears no real or substantial relationship to the general health, morals, or welfare of the public, and, therefore, is not a valid exercise of the state's police power.

> The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and

> generally for the public welfare. [Citation omitted.] Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. [Citation omitted.]

Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm., 217 Neb. 487, 489, 351 N.W.2d 701, 703 (1984). Thus, when a fundamental right or suspect classification is not involved in legislation, a legislative act is a valid exercise of a state's police power if the act is reasonably related to a legitimate governmental interest. See *People v. Pharr*, 696 P.2d 235 (Colo. 1984).

The language of a legislative enactment may provide a manifest indication of the objective to be achieved through the legislation. See *Schaffer v. City of Omaha*, 197 Neb. 328, 248 N.W.2d 764 (1977). However, with or without an expression of the legislatively avowed objective, a court has the duty to determine whether the Legislature has exercised the state's police power in a manner reasonably related to the general health, morals, or welfare of the state's citizens. If the legislative enactment furthers a governmental interest in the well-being of the citizenry, the act must be upheld regardless of whether the Legislature contemplated the exact nature of the benefit accorded by the legislation.

The Attorney General has made no argument that L.B. 835 endangers a fundamental right or results in a suspect classification. Therefore, the act is a valid exercise of police power if the legislation is reasonably related to the general welfare of the people of Nebraska.

Without again setting forth in detail the conflicting testimony of the two economic experts presented by each side, we find that L.B. 835 is reasonably related to legitimate governmental interests of the State of Nebraska. Dr. Alessio's testimony indicates that Nebraska's regulatory structure before L.B. 835 did not provide existing telecommunications companies with the pricing flexibility needed to respond to an increasingly competitive market. Without this flexibility, telecommunications companies would likely lose, and in fact have lost, revenue previously derived from a number of their

larger subscribers. Furthermore, L.B. 835 allows the PSC to "limit, remove, or waive regulatory requirements for telecommunications companies when it determines that competition will serve the same purposes as public interest regulation." L.B. 835, § 7 (§ 86-807).

A legislature has discretion in determining what measures are reasonably necessary to protect public health, safety, and welfare, and, in reviewing a legislative act, a court should not substitute its own judgment for that of the Legislature merely because the court may believe that the Legislature acted unwisely or improvidently. See *State v. Yu*, 400 So. 2d 762 (Fla. 1981). By enacting L.B. 835, the Legislature has made a policy pronouncement that the flexibility of free competition is sometimes preferable to regulation as a method of controlling telecommunications rates. We cannot say that this conclusion is so fundamentally flawed as to constitute an unconstitutional exercise of the state's police power.

CONCLUSION

The Attorney General has failed to demonstrate the unconstitutionality of L.B. 835. The legislation does not contravene Neb. Const. art. IV, § 20, nor does the act facially deny due process of law for telecommunications customers. Finally, the act is a valid exercise of the state's police power. Therefore, we conclude that L.B. 835 is constitutional in all challenged respects. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I dissent. Laissez-faire may be an acceptable doctrine in some theories of government regulation, but I do not think the Nebraska Constitution permits that approach to setting rates for telecommunications companies in Nebraska.

I feel that 1986 Neb. Laws, L.B. 835, codified as Neb. Rev. Stat. §§ 86-801 et seq. (Reissue 1987), violates Neb. Const. art. IV, § 20, which provides:

> There shall be a Public Service Commission . . . . The powers and duties of such commission shall include the regulation of rates, service and general control of

> common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

A portion of § 86-803 provides: "Telecommunications companies shall not, however, be subject to any rate regulation by the commission and shall not be subject to provisions as to rates and charges prescribed in Chapter 75, articles 1 and 6." I believe that provision renders the whole of L.B. 835 unconstitutional.

The history of the adoption of Neb. Const. art. IV, § 20, is set out in *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949). Included in that history is the court's conclusion:

> The language finally adopted [in the Nebraska Constitution] positively provides that the powers of the commission shall include the regulation of all the enumerated matters with the right of the Legislature to control the manner in which the commission shall perform its independent constitutional duties, or to enter the field itself to the extent of "specific legislation." The conclusion is logical, if not inescapable, that the Legislature would not have proposed, and the people would not knowingly have approved, an addition to the Constitution creating a commission with power only to regulate and control common carriers to the extent and for the time provided or permitted by the Legislature . . . .

151 Neb. at 343, 37 N.W.2d at 508.

In construing the meaning of "general" and "specific" as used in Neb. Const. art. IV, § 20, the *Ramsey* court stated: "It was not intended by the use of these words to authorize unlimited, broad, general legislation in reference to the control and regulation of common carriers." 151 Neb. at 344, 37 N.W.2d at 509.

In my judgment, L.B. 835 constitutes unlimited, broad, general legislation in purporting to free telecommunications companies from any rate regulation.

The *Ramsey* opinion referred to *State, ex rel. Missouri P. R. Co., v. Clarke*, 98 Neb. 566, 153 N.W. 623 (1915). In that case,

the Legislature, by statute (commonly called the "Two-cent Fare Act"), had fixed a maximum rate of 2 cents per mile for railroad passenger rates and then, 21 days later, had enacted a statute granting the Legislature the power "to fix all necessary rates, charges and regulation to govern and regulate the freight and passenger tariffs of railway companies . . . ." Rev. Stat. § 6109 (1913). The relator contended the later statute authorized the commission to raise the rates beyond 2 cents. The *Clarke* court held to the contrary, stating: "The general power of the state railway commission, as applied to passenger traffic, is limited to rates below the maximum fixed by the two-cent fare law." 98 Neb. at 571, 153 N.W. at 625. In my opinion, this holding determines that "specific legislation," in this area of the law, is the setting of rates and not the outlawing of rate regulation.

I construe the *Ramsey* and *Clarke* cases to mean that if the Legislature preempts the rate field by setting specific rates, it has enacted the "specific legislation" referred to in article IV, § 20. In my judgment, the authority to set a specific rate does not extend the authority of the Legislature to say "no one shall regulate rates." In their Constitution, the people of the State of Nebraska have expressed their decision that either the Legislature or the commission shall regulate the rates of common carriers. I do not believe that constitutional directive can be thwarted by legislative action abolishing rate regulations as to specific common carriers.

In enacting §§ 86-801 et seq., the Legislature has attempted to repeal Neb. Const. art. IV, § 20. I do not believe the Legislature can do that. I would reverse the judgment of the trial court and hold that §§ 86-801 to 86-811 are unconstitutional as violating Neb. Const. art. IV, § 20.

BOSLAUGH, J., joins in this dissent.

LAVINA SEVIER ET AL., APPELLEES, V. SCHOOL DISTRICT HC 1, HOOKER COUNTY, MULLEN, NEBRASKA, ET AL., APPELLANTS.

444 N.W.2d 897

Filed September 1, 1989. No. 87-837.

1. **Administrative Law: Schools and School Districts: Records.** The petitions and the order of the county superintendent are the official public records of a merger of school districts.
2. **Administrative Law: Estoppel.** The doctrine of equitable estoppel ordinarily cannot be invoked against a governmental entity in the exercise of governmental functions. Exceptions to the rule are made only where right and justice so demand; the doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice.

Appeal from the District Court for Hooker County: DONALD E. ROWLANDS II, Judge. Reversed and remanded with directions.

Philip M. Martin, Jr., of Paine, Huston, Higgins & Martin, for appellants.

Gregory H. Perry, of Perry, Guthery, Haase, & Gessford, P.C., and Warren R. Arganbright for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

MULLEN, D.J.

On February 9, 1987, the board of education of school district HC 1 of Hooker County passed a resolution to close the elementary school attendance center located in Seneca, Nebraska. The plaintiffs commenced an action seeking an injunction to prevent school district HC 1 from closing the Seneca attendance center until the legal voters served by the school voted by a majority vote for discontinuance of the school. The case was tried to the court upon a stipulated set of facts. The district court found for the plaintiffs and permanently enjoined the closing of the attendance center until and unless the school district complied with the majority vote requirements of Neb. Rev. Stat. § 79-402.07 (Reissue 1987). Additionally, the district court declared the school district's resolution to close the elementary school attendance center null

and void. We reverse.

The appellants' assignments of error can be summarized as follows: The trial court erred in finding that the reorganization of school districts was not solely controlled by the reorganization petitions and final order of the county superintendent, and in failing to find that the county reorganization committee lacked legal authority when the committee's action went beyond the express terms of the petitions. Secondly, the court erred in imposing the extreme sanction of injunction against the school district.

In 1965, school district HC 1 in Hooker County at Mullen, Nebraska, and school district No. 6 in Thomas County determined that a school reorganization would be to their mutual benefit. Prior to the reorganization, school district No. 6 had operated an elementary school in Seneca. As a result of the reorganization, school district No. 6 merged into school district HC 1. School district HC 1 continued to operate the elementary school attendance center in Seneca until its attempted closing by the school district, which precipitated this lawsuit.

On May 31, 1965, the board of education of school district No. 6 signed the boundary change petition. On June 1, 1965, the board of education of school district HC 1 signed a similar petition. Although not reflected in the petition, the minutes of the meeting of the board of school district HC 1 includes the following:

> It was moved by John Munn and seconded by Don Mallory to officially declare that there be a K-6 ward school located at Seneca as long as the majority of the patrons of that community, presently designated as School District Number 6 of Thomas County desire a K-6 ward school, and in accepting the merger of the Seneca Districts this is to be a part of the agreement. . . .

The special committee of Hooker and Thomas Counties met for the purpose of reviewing the proposed reorganization on June 10, 1965.

The special committee passed a resolution which contained the following:

> (3) Following is a summary of the terms on which

reorganization is to be made between the reorganized districts:

. . . .

(f) A K-6 elementary school shall be located at Seneca as long as the majority of the patrons of that community so desire.

(4) . . . It is proposed that a K-6 elementary school remain at Seneca. They have an excellent elementary plant. . . .

On June 17, 1965, the reorganization petition proposal was approved by the state school district reorganization committee.

On August 5, 1965, the county superintendent of Hooker County certified that the boundary lines of the school districts had been changed.

As it affects this case, the statutory reorganization structure is unchanged since 1965 and was codified at § 79-402.07 (Reissue 1981), which statutory reference was used by the trial court.

In *School Dist. of Gering v. Stannard*, 193 Neb. 624, 228 N.W.2d 600 (1975), school district boundaries were sought to be changed based upon a petition which did not conform to statutory requirements. A duly adopted resolution of the plaintiff's board of education was filed, and the county superintendent considered them together when he effected the requested change in boundaries. The court said: "Plaintiff contends there was no petition from the board of education filed with the county superintendent and that the resolution is insufficient for this purpose. We disagree. The resolution clearly approves and requests the transfer of the land and it was filed." *Stannard* at 629, 228 N.W.2d at 605. "No petition as such was so filed but a certified copy of the resolution was." *Id.* at 626, 228 N.W.2d at 604.

In *Stannard*, the filed resolution was allowed to stand in the place of a petition. In the instant case, the resolution which was not filed is offered to augment the petitions.

There is no evidence that the special committee of Hooker and Thomas Counties filed the resolution as in *Stannard*, or in any actual or constructive manner notified the state school district reorganization committee. Exhibit E of the stipulation

contains the general plan of reorganization (Form D). At the end of Form D is the statement, "Remarks: A copy of this Form D is being mailed to Henry C. Ebmeier along with copies of the petitions, minutes, resolutions, and other documents relative to this reorganization." The record shows that Henry C. Ebmeier was the State Department of Education consultant for school district reorganization. The stipulation does not indicate that the minutes, resolutions, and other documents were in fact sent to the State Department of Education or received by it. There is no other evidence that the State Department of Education received the minutes and resolution which contain the special committee's agreement to maintain an attendance center at Seneca.

Warren v. Papillion School Dist. No. 27, 199 Neb. 410, 418, 259 N.W.2d 281, 286 (1977), states, "The petitions and the order of the county superintendent are the official public records of the merger . . . ." The resolution may state underlying reasons for the proposed merger, but it cannot stand in the place of a petition filed according to statutory mandate.

Supporting this rationale is *Osmera v. School Dist. of Seward*, 216 Neb. 261, 343 N.W.2d 886 (1984), in which the school districts of Ulysses and Seward filed petitions for consolidation of the Ulysses school district into the Seward school district. Cooperative Reorganization Commitments were entered into by certain Class I districts and Seward. Ulysses did not participate in the negotiations, and the commitments were not incorporated into the petitions. In affirming the trial court's decision denying injunctive relief, the court stated: "Neither Ulysses' nor Seward's petition refers to the Cooperative Reorganization Commitments . . . . Further, neither petition contained any other condition or exception." *Osmera* at 263, 343 N.W.2d at 889.

As noted in *Stannard*, there are instances when the school reorganization statutes would not be strictly construed. However, in those instances other documents were filed which gave notice to all of the intent of the parties.

The consequences of the evidence failing to demonstrate notice to the State Department of Education are reflected in *Warren, supra,* in which the plaintiffs sought to enforce an oral

promise of the Papillion school district to provide bus service for students in the Ireland school district. Although the districts had merged, the court held that the Papillion school district could not be estopped from terminating the bus service, because the oral promise was not a part of the written records of the reorganization. As in *Warren*, there is no evidence showing that those persons empowered by statute to make decisions regarding the reorganization had the specific agreement before them now sought to be enforced.

The plaintiffs further contend that the defendants should be estopped from closing the attendance center since the agreement has been relied on since 1965.

The elements constituting equitable estoppel are recited in *Osmera v. School Dist. of Seward, supra* at 266, 343 N.W.2d at 890, which states that the elements are:

> "As to the party estopped, '* * * (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.' As to the other party, '* * * (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.' " *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 798-99, 186 N.W.2d 711, 714 (1971). See *County of Scotts Bluff v. Hughes*, 202 Neb. 551, 276 N.W.2d 206 (1979).

The defendants did not engage in conduct which would amount to a false representation or conceal a material fact.

" 'Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. . . . Exceptions are made only where right and justice so demand. . . .' " *Osmera v.*

School Dist. of Seward, supra at 265, 343 N.W.2d at 890; *Christian v. Geis*, 193 Neb. 146, 225 N.W.2d 868 (1975); *Warren v. Papillion School Dist. No. 27, supra.*

It is undisputed that all of the facts relating to the merger were disclosed and understood by the parties. The doctrine of equitable estoppel is inapplicable.

Since the case is resolved on appellants' first assignment of error, discussion of the remaining assignment of error is unnecessary.

The cause is remanded to the district court with directions to dissolve the permanent injunction imposed on the defendants and to render judgment for the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

JOAN F. JANIK AND NORMAN L. JANIK, APPELLANTS, V. JOHN W. GATEWOOD, M.D., APPELLEE.

444 N.W.2d 900

Filed September 1, 1989. No. 87-891.

1. **Evidence: Verdicts: Appeal and Error.** Insofar as the sufficiency of the evidence is concerned, a verdict based on conflicting evidence will not be set aside unless clearly wrong.
2. **Evidence: Testimony: Witnesses.** Where testimony is given by a witness on direct examination and that testimony creates an inference favorable to the party producing the witness, anything within the knowledge of that witness tending to rebut the inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for a new trial.

Dana C. Bradford III, of Bradford, Coenen, Ashford & Stangl, for appellants.

Patrick G. Vipond, of Sodoro, Daly & Sodoro, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Plaintiff-appellant Joan F. Janik filed this malpractice action against defendant-appellee, John W. Gatewood, M.D. Although plaintiff's husband was named as an additional plaintiff, this opinion will be written as if Joan Janik were the sole plaintiff. On May 10, 1984, defendant performed a bilateral subcutaneous mastectomy with reconstruction on plaintiff. The surgery was necessitated by a medical condition called fibrocystic disease, which had manifested itself in the form of reoccurring cysts in plaintiff's breasts. Plaintiff alleged in her petition that defendant deviated from the standard of care required of him in the surgery and postoperative treatment. Defendant denied any negligence.

After the jury returned a verdict in defendant's favor, plaintiff moved for a new trial, and the motion was denied. Plaintiff then timely appealed, assigning the following as error: (1) that the jury "disregarded material and uncontroverted evidence which clearly showed that the Appellee had breached the standard of care he owed the Appellant . . ." and (2) that the trial court erred in limiting the scope of plaintiff's cross-examination of defendant's expert witness.

The record shows that on May 1, 1984, plaintiff agreed to have defendant perform the surgery at the suggestion of her physician, John W. Monson, who was also defendant's associate. Defendant did not discuss the risk of complications with her, but Monson testified that he discussed with her the possibility that the prostheses might be rejected by her body. Defendant performed the operation on May 10, 1984.

Thereafter, on May 18, 1984, defendant examined plaintiff in his office. He removed staples from the surgery wounds and observed a discharge of fluid from the wound on the left breast. He testified that he thought it was serum, a normal byproduct of surgery. Plaintiff testified that the left prosthesis was exposed through the wound at this time, although defendant stated that he first observed the prosthesis through the wound on June 12, 1984, during plaintiff's seventh postoperative visit. Defendant resutured the wound at that time in an attempt to save the prosthesis. A few days later the wound had enlarged, and defendant resutured it a second time.

Monson examined plaintiff on June 21 and 28, 1984, because defendant was out of the office. Upon defendant's return, Monson and defendant agreed that the left wound should be sutured once more. Defendant resutured it on July 3, 1984. Shortly thereafter, defendant examined plaintiff and discovered that the wound still had not closed. Defendant resutured it a fourth time.

By July 18, 1984, the left wound had closed and appeared to be healing. The wound continued to look good on plaintiff's next two visits. On August 8, 1984, all but one suture had been removed. Still, a drop of clear yellow fluid was discharged from the left wound. Plaintiff testified that she told the defendant that every few days she would experience swelling and a discharge of fluid from the wound.

On August 17, 1984, the last suture was removed. A small opening in the left wound remained. Plaintiff testified that she again informed defendant that every few days she would experience swelling and a discharge of fluid from the left wound. The wound was resutured with a single suture on August 27, 1984. That suture had to be replaced the following week when the wound failed to remain closed.

On September 20, 1984, Monson examined plaintiff at her request. The last time he had seen her was on June 28, 1984. Monson testified that the left wound, which had swelled considerably since that time, broke open during his examination, discharging a large amount of fluid. He stated that he thought the prosthesis was infected and had to come out. He later discussed this with the defendant, who removed the left prosthesis on October 3, 1984.

On October 22, 1984, plaintiff visited defendant's office for the last time and asked for and obtained her medical files. On November 2, 1984, she consulted Steven Black, M.D., a plastic and reconstructive surgeon. Black advised her that reconstructive surgery on the left breast should wait until the inflammation subsided and that the right prosthesis was riding high and eventually would have to be lowered.

On December 28, 1984, plaintiff visited Black again, complaining of a discharge of fluid from her left breast. Black recommended a biopsy, and he took a culture on January 10,

1985. No culture had been taken by defendant before that time because defendant thought a culture was unnecessary as a part of plaintiff's postoperative treatment. On the same day Black took the culture, Black also placed plaintiff on antibiotics. Defendant testified that he had not previously placed plaintiff on antibiotics because he thought antibiotics were not necessary, other than immediately following surgery when he prescribed the antibiotic Keflex.

The culture revealed that an atypical microorganism was growing in plaintiff's left breast. Philip W. Smith, M.D., a specialist in infectious diseases, confirmed that plaintiff had an uncommon infection. Smith subsequently treated plaintiff's infection with various antibiotics. On January 22, 1985, Black removed the right prosthesis to eradicate the entire infection. Plaintiff was placed on intravenous antibiotics and remained in the hospital for 30 days. Later that year, she moved with her family to Pennsylvania, where she came under the care of Richard M. Levine, M.D., a plastic and reconstructive surgeon.

Plaintiff's first assignment of error merely states that "[t]he jury disregarded material and uncontroverted evidence which clearly showed that the Appellee had breached the standard of care he owed the Appellant Joan Janik." Such a statement does not direct us to what action of the trial court plaintiff considers erroneous and makes the assignment almost impossible to consider. We have determined, however, that if plaintiff is contending that the evidence is insufficient to support a verdict for defendant, that contention has no merit. The evidence supporting a verdict for plaintiff was contested in every respect, and evidence was offered on behalf of defendant controverting evidence offered by plaintiff. A jury question was presented on all issues raised by plaintiff. The credibility of the witnesses and the weight to be given their testimony is for the jury. Insofar as the sufficiency of the evidence is concerned, a verdict based on conflicting evidence will not be set aside unless clearly wrong. *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983). Plaintiff's first statement is without merit.

A more difficult question is presented by plaintiff's second assignment of error, which contends that the trial court erred in sustaining defendant's objections to a substantial portion of

plaintiff's cross-examination of defendant's expert witness.

On direct examination, defendant's expert witness, Mario Baccari, M.D., stated that he was certified in two specialties, general surgery and plastic surgery; that he had reviewed the depositions of the parties and other doctors who testified; and that he had examined the medical records of the surgery performed by defendant. Baccari testified on direct examination as follows:

> Q. Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, as to whether or not Dr. Gatewood deviated from the standard of care for surgeons in not prescribing prophylactic antibiotics before surgery?
>
> A. . . . [Y]ou are talking about antibiotics either given before the surgery or during the surgery? There is a question as to whether those actually do what people think they should be doing. I don't think he deviated in that regard.

Baccari also testified as follows:

> Q. In reviewing how the operation was performed by Dr. Gatewood, do you have an opinion as to whether or not he followed the standard of care for general surgeons or reconstructive surgeons in the manner and method he performed that surgery?
>
> A. In the way he performed the surgery, I have no problem at all.

Baccari concluded that he thought the right prosthesis should not have been removed by Black.

During the cross-examination of defendant's expert by plaintiff, the expert was asked: "[B]ased upon a reasonable degree of medical certainty, and based upon a review of all of the documents that you have referred to and read in this case, did Dr. Gatewood in any manner breach the standard of care?" Defendant's objection to this question was sustained, as were objections to specific questions exploring the manner in which defendant conducted plaintiff's postoperative treatment. The court sustained objections to questions concerning defendant's resuturing of the wound and the expert's opinion on the risk of infection in an open wound. In short, the trial judge confined

plaintiff's cross-examination of defendant's expert to the issues surrounding the physical acts of the surgery performed by defendant and the later removal of the right prosthesis by Black. Plaintiff now challenges this ruling.

It is true that " '[a]bsent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed.' " *Palmer v. Forney*, 230 Neb. 1, 7, 429 N.W.2d 712, 716 (1988). This court has observed that in order to find a judicial abuse of discretion, the reasons or rulings of a trial judge must be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through the judicial system. *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

Defendant contends that the trial court properly limited cross-examination strictly to the scope of the direct examination, and for this reason the ruling should not be disturbed. Plaintiff asserts that by excluding the line of questioning concerning the manner in which defendant conducted plaintiff's postoperative treatment of the left wound, plaintiff was unable to elicit testimony necessary to discredit, qualify, or render improbable the opinion expressed by defendant's expert witness on direct examination. Thus, the dispositive question here is whether the trial judge, in limiting cross-examination as he did, abused his discretion so as to prevent plaintiff from eliciting testimony that would affect the credibility of defendant's expert witness.

Cross-examination in trials in our courts is generally controlled by the provisions of Neb. Evid. R. 611 (Neb. Rev. Stat. § 27-611 (Reissue 1985)), which provides in part: "(2) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Rule 611(2) permits cross-examination on matters affecting the credibility of a witness and thus reflects the earlier holding of this court in *Scofield v. Haskell*, 180 Neb. 324, 142 N.W.2d 597 (1966).

In addition, where testimony is given by a witness on direct examination and that testimony creates an inference favorable

to the party producing the witness, anything within the knowledge of that witness tending to rebut the inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right. *Scofield v. Haskell, supra.*

The nature of the evidence sought to be elicited from defendant's expert was apparent from the context within which the questions were asked. Neb. Rev. Stat. § 27-103 (Reissue 1985). See *Schmidt v. Schmidt*, 228 Neb. 758, 424 N.W.2d 339 (1988). The ruling of the trial judge denied plaintiff the opportunity to explore whether defendant's expert in fact held any contrary opinions concerning the way in which defendant conducted plaintiff's postoperative treatment. Consequently, plaintiff was unfairly deprived of the right to test either the value of the expert's opinion or the degree of credibility to be attached to his testimony. The action of the trial court in excluding such evidence affected a substantial right of plaintiff.

Defendant's expert was qualified on direct examination as an expert in both general and plastic surgery. He stated that he reviewed the depositions of defendant and of the other doctors who served as witnesses. He testified about preoperative antibiotics, the actual surgery, and even the postoperative treatment of the right breast by another physician. As previously stated, the expert testified that in his opinion, defendant followed the standard of care in the way defendant performed the surgery.

The expert's opinion, taken together with his above testimony, created an inference that he was also of the opinion that defendant met the standard of care in the way defendant conducted plaintiff's postoperative treatment. Plaintiff was denied the opportunity to rebut the inference when plaintiff was not allowed to establish the limits of the opinion held by defendant's expert witness.

The ruling by the trial judge was an abuse of discretion. Plaintiff should have been permitted to fully cross-examine defendant's expert and should not have been confined strictly to examination concerning only the physical act of the surgery itself. The limitation of plaintiff's cross-examination was error requiring a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. BESSIE HILL, ALSO KNOWN AS BESSIE STUBBLEFIELD, APPELLANT.
444 N.W.2d 905

Filed September 1, 1989. No. 88-194.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, Douglas J. Peterson, and Jill Gradwohl Schroeder for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITEHEAD, D.J.

Bessie Hill, also known as Bessie Stubblefield, appeals her jury convictions and resulting sentences for possession with intent to deliver a controlled substance and unlawful possession of a controlled substance. We affirm Hill's convictions and sentences.

On August 10, 1987, two Omaha police officers, Haskell and Smith, were conducting a surveillance of an area in the 2300 block of Charles Street, Omaha, Nebraska, which was known to the officers as one of the highest areas of drug traffic in the city. They had conducted this surveillance on various occasions in the prior 6 weeks.

Officer Haskell had participated in the earlier surveillance and knew who the defendant was and knew that she did not live in the immediate area. This officer, partially obscured by trees and weeds, was standing 20 to 30 feet from the area where the defendant was standing. Haskell observed the defendant and a woman approaching the defendant. The woman and the defendant spoke briefly, and then the woman handed the defendant cash and the defendant handed something to the woman. Because the defendant had her back to the officer, the officer did not see what the defendant gave the woman. A man approached the defendant and pointed to the officer, and defendant Hill headed toward her car. Haskell radioed Officer

Smith, who was in the cruiser, to assist him and then stopped the defendant before she got to her car. Haskell asked for identification, and the defendant provided it. Haskell then went to the cruiser and checked for outstanding warrants on the defendant. Smith, who had been in the cruiser, stayed with the defendant. Smith observed that the defendant appeared to be attempting to hide something she had in her hands by moving her arms into positions which kept them away from Smith's view. Smith asked the defendant to show him what she had in her hand, but she refused. When Smith tried to take hold of the defendant's arm, Hill threw a prescription bottle about 10 feet. Haskell retrieved the bottle. A laboratory check of the contents revealed the bottle contained packets of cocaine and 14 tablets of 20 milligrams each of methylphenidate. The defendant was placed under arrest and was taken to the station, where her purse was searched and revealed no further controlled substances.

Before trial, the defendant moved to suppress physical evidence seized by a search of the defendant's person and immediate surroundings on August 10. The trial court overruled the motion. During the trial of the case, the defendant's only objection was raised after the contents of the purse were introduced into evidence. A jury found the defendant guilty on both charges.

The defendant's principal assignment of error is that the district court erred in overruling the defendant's motion to suppress based upon the argument that the police officers failed to articulate facts sufficient to justify the detention and that they went beyond the permissible scope provided by law.

In reviewing the trial court's order on the motion to suppress, this court will not overrule the trial court's finding of fact unless the findings are clearly erroneous. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987). Neb. Rev. Stat. § 29-829 (Reissue 1985) provides that a police officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime, and may demand of him his name, address, and an explanation of his actions.

The police officer, in the case at hand, approached the

defendant based upon all the facts before him. It is the court's opinion that he had reason to believe that the defendant was committing, had committed, or was about to commit a crime. Officer Haskell observed the defendant walking the area of the 2300 block of Charles Street and talking with various people. Haskell was observing the defendant because the narcotics unit of the police department received information that the defendant was dealing drugs. Also, the area in which the defendant was observed was the highest drug trafficking area in the city at that time, and he knew that the defendant did not live in that area. Haskell observed the defendant talking with a woman who handed money to the defendant, and immediately after the woman handed the money to the defendant, a man ran up to the defendant and pointed toward Haskell standing nearby. The defendant looked toward the officer and then walked toward her car.

Also, in a period of 6 weeks prior to August 10, Officer Haskell had observed the defendant standing on the sidewalk in the area of the 2300 block of Charles Street, and individuals would approach and talk to her. They would then get in the defendant's car, drive around the block, and return to the same area. The defendant would park her car, and they would both get out of her car and go in separate directions. Sometimes the defendant would stay on the sidewalk until someone else would come along to talk to her, and then they would go into one of the houses there, be in the house for 5 to 20 minutes, and come back out. The defendant would then wait until the next person came along.

At the time, the officers believed that a drug transaction had taken place. It should be noted that the person of the defendant was not searched, nor were her purse or other belongings gone through. The officers were just trying to identify the defendant and see if there were any outstanding warrants for her. When Officer Smith believed the defendant was hiding something in her hand from him and he attempted to find out what it was, the defendant flung the medicine bottle in question.

In *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972), the U.S. Supreme Court stated that " 'a police officer may in appropriate circumstances and in an

appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.' " 407 U.S. at 145. In fact, the Court goes on to say that "it may be the essence of good police work to adopt an intermediate response." *Id.* A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be more than reasonable in light of the facts known to the officer at the time. *Adams, supra.* See, also, *State v. Gross*, 225 Neb. 798, 408 N.W.2d 297 (1987); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).

Even if the court agreed with the defendant that the trial court did err in overruling her motion to suppress evidence, this matter would not be before the court for consideration inasmuch as the defendant did not preserve her objection at trial. In a criminal trial, after a pretrial hearing and order which overrules the defendant's motion to suppress evidence, the defendant must object at trial to the receipt of the evidence in order to preserve the question for review on appeal. Nebraska Evid. R. 103 (Neb. Rev. Stat. § 27-103 (Reissue 1985)); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

"This court has consistently held that a defendant may not predicate error on the admission of evidence to which timely objection was not made." 224 Neb. at 894, 402 N.W.2d at 270. Uniformly, we have held that the alleged error was not presented for our review because of the lack of objection to the evidence at trial. Even if the court agreed with the defendant that the district court erred in not sustaining the defendant's motion to suppress evidence, the error was not preserved for consideration by this court, and, therefore, the judgment and sentences must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT R. VENABLE, APPELLANT.

444 N.W.2d 907

Filed September 1, 1989. No. 88-394.

1. **Constitutional Law: Juries: Discrimination: Prosecuting Attorneys.** Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race, the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.
2. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.
3. _____: _____: _____: _____. Once the defendant has made a prima facie case of discrimination in the selection of a jury, the burden shifts to the State to provide a neutral explanation for the peremptory challenges related to the particular case to be tried.
4. **Trial: Juries: Discrimination: Appeal and Error.** The trial court's findings that there was no discrimination in the selection of a jury are not to be reversed on appeal unless clearly erroneous.
5. **Rules of Evidence: Witnesses.** The credibility of a witness may be attacked by any party, including the party calling him.
6. **Criminal Law: Witnesses: Proof.** A witness may be impeached by proving his conviction of a felony.
7. **Witnesses: Evidence: Appeal and Error.** The reception of evidence affecting the credibility of a witness is within the discretion of the trial court and will not be reversed on appeal in the absence of an abuse of that discretion.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FUHRMAN, D.J.

Robert R. Venable, convicted by a jury of robbery, was sentenced to serve a term of 16 2/3 to 50 years. Venable appeals, claiming the court erred in failing to grant a mistrial because the prosecution used a peremptory challenge to strike one of the only two black prospective jurors and in allowing the prosecutor to ask his rebuttal witness if she had been convicted of a felony. We affirm.

After the voir dire of the jury, the prosecution used a peremptory challenge to dismiss Calvin Brye as a prospective juror. Defense counsel moved for a mistrial based on the prosecution's dismissal of one of two black prospective jurors. The other black juror was left on the panel. The prosecutor gave three reasons for the dismissal. First, Brye's address was in the same general area as the address to which the car in which some of the stolen merchandise was found was registered. Second, in the experience of the prosecutor, persons in Brye's type of work (social services) were generally not sympathetic to the State's position, and the prosecutor generally excluded all persons in this type of work. Third, a law clerk with the prosecutor's office, who had been watching the proceedings and who had been identified as an acquaintance of another prospective juror, told the prosecutor he knew Brye, but Brye did not mention knowing the law clerk. The defense counsel objected to the court's considering the third reason because it was based on hearsay, but the judge overruled the objection.

The judge overruled the defense's motion for mistrial, saying:

> The State did come forward with several reasons why it struck Mr. Brye from the venire persons who had been chosen as perspective [sic] jurors. Had Mr. Ashford [the prosecutor] struck the other black member of the jury I would have no hesitancy of sustaining your Motion, Mr. O'Connor [defense counsel]. . . .
>
> . . . .
>
> . . . Christina King, who is black, remains a member of the jruy [sic]; and absent of showing that Mr. Ashford's striking of Mr. Brye was racially motivated I'm going to overrule your Motion at this time.

Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In so holding, *Batson* overturned the evidentiary standard contained in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), which required a showing of systematic exclusion of black jurors over time, and established a new multistep standard of proof for showing discrimination in the jury selection process. In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race. Once the defendant has made a prima facie case, the burden shifts to the State to provide a neutral explanation for the challenges related to the particular case to be tried. The explanation need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to defendant because of their shared race. *Batson v. Kentucky, supra*; *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987); *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988); *State v. Brockman*, 231 Neb. 982, 439 N.W.2d 84 (1989).

By asking the State to articulate its reason for questioned strikes, a trial court implicitly finds a criminal defendant has met her or his burden of proving a prima facie case of discrimination in the selection of a jury. The trial court's

findings that there was no discrimination in the selection of a jury are not to be reversed on appeal unless clearly erroneous. *State v. Rowe, supra.*

In this case, upon being asked to articulate its reason for the questioned strike, the prosecutor stated three reasons for the exercised peremptory challenge of one of the two black prospective jurors. The trial court overruled defense counsel's motion for mistrial, which was based upon alleged discrimination in selection of the jury.

It is inherent in the trial court's order overruling Venable's motion for a mistrial claiming discrimination in the selection of his jury that the trial court found the prosecutor did not strike the black juror because of his race, but rather on neutral grounds. We cannot say that the trial court's ruling was clearly erroneous. Venable's assignment of error in regard to the selection of the jury that tried him is not supported by the record.

Finally, Venable contends it was improper for the prosecutor to ask his rebuttal witness if she had been convicted of a felony.

The trial record shows that after the defense had rested, the prosecutor called Teresa Rigby as a rebuttal witness. After asking Rigby to identify herself, the prosecutor then asked:

> Q [Mr. Ashford]. Ms. Rigby, have you ever been convicted of a felony?
>
> A. Yes.
>
> MR. O'CONNOR: Your Honor, I object. This is the same thing — May I approach the bench?
>
> (At this point, counsel for the parties approached the side bar and the following record was made in low tones.)
>
> THE COURT: Go ahead.
>
> MR. O'CONNOR: The last question asked, the first question on direct examination was whether the witness had ever been convicted of a felony. It was my concern in question in chambers — Mr. Ashford called her as a rebuttal witness and rebuttal witness only. He can bring her on to impeach her or for impeachment. The question, the first question out of his mouth is not an impeachment question and the answer has been given in front of the jury. He had no right to do that. I would ask that the jury

be instructed to disregard, and that she can no longer be used as a witness, and told by the Court to be dismissed, and in the alternative I'll ask for a dismissal.

THE COURT: Say it now.

MR. ASHFORD: Yes, Your Honor. At this time there is a general question that can be asked of all witnesses. It's as to whether or not they've ever been convicted of a felony. It's confined to that question, and are there any convictions that regard dishonesty. That's a general question that can be asked of any witness at any time.

MR. O'CONNOR: That's an impeachment witness, and only impeachment questions . . .

THE COURT: Well, it gives both — It certainly goes to her credibility, number one, and certainly if she's answered the question it certainly goes for impeachment.

MR. O'CONNOR: What was the intent of it being asked? Only one intent. Impeachment.

MR. ASHFORD: That's not the case, Your Honor.

THE COURT: Your motion is overruled.

The prosecutor was then allowed to ask the question again and Rigby responded, "Yes, I have."

The credibility of a witness may be attacked by any party, including the party calling him. Neb. Rev. Stat. § 27-607 (Reissue 1985); *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). A witness may be impeached by proving his conviction of a felony. *State v. Reinert*, 197 Neb. 379, 248 N.W.2d 782 (1977).

The prosecution is allowed to impeach witnesses called by it. There is no evidence Rigby was called for the purpose of impeaching the credibility of Venable with her felony conviction. The reception of evidence affecting the credibility of a witness is within the discretion of the trial court and will not be reversed on appeal in the absence of an abuse of that discretion. *Hampton v. Strove*, 160 Neb. 305, 70 N.W.2d 74 (1955).

It appears no reversible error was made in regard to Teresa Rigby's testimony. The defendant's conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY L. GRELL, APPELLANT.
444 N.W.2d 911

Filed September 1, 1989. No. 88-667.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Theft: Time.** The offense of theft by deception may take place over a period of time.
3. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
4. **Probation and Parole: Sentences: Appeal and Error.** A sentence of probation, as opposed to a sentence of imprisonment, is a matter within the discretion of the trial court and will not be set aside on appeal absent an abuse of discretion.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Paul M. Conley for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Stanley L. Grell, was convicted by a jury of theft by obtaining property of Iola Coatney by deception, such property having a value of $7,974. The defendant was sentenced to 5 years' probation. He has appealed and has assigned as error (1) the finding that the evidence was sufficient to sustain his conviction; (2) the failure to grant a new trial, sua sponte; (3) the failure to grant a mistrial upon the ground of ineffective assistance of trial counsel; and (4) his sentence to probation.

The record shows that in the fall of 1986, Iola Coatney, who was then approximately 64 years old, expressed an interest in

purchasing rest home insurance for herself and her husband, William E. Coatney. Mr. Coatney had been disabled by a stroke in 1980. The defendant, who was in the insurance business, telephoned Mrs. Coatney and arranged to meet with her at her home in Lincoln to discuss purchasing the insurance.

During a meeting with the defendant on October 10, 1986, Mrs. Coatney gave him two checks, one for $2,696 and one for $600, as a "down payment" on rest home insurance for both herself and her husband. On December 5, 1986, Mrs. Coatney gave the defendant another check, for $1,382, for her rest home insurance. On December 23, 1986, Mrs. Coatney gave the defendant a $3,296 check for rest home insurance for her husband. In each instance, the defendant told Mrs. Coatney to make the check payable to him. The December 23 check was issued because the defendant told Mrs. Coatney that he had held the two October checks (for $600 and $2,696) too long. In fact, the defendant cashed all of Mrs. Coatney's checks, and they were paid out of her checking account.

After Mr. Coatney was found to be uninsurable, the defendant issued a $3,296 refund check to Mrs. Coatney, drawn on his personal account. Payment of this check was refused. The defendant subsequently promised Mrs. Coatney that he would make monthly payments to her to cover the refund check, but no such payments were ever made. Mrs. Coatney testified that she believed that an insurance policy for her had been approved, but she never received an insurance policy, notwithstanding the defendant's assurances that delivery of her policy had been delayed.

The record further shows that the defendant had been instructed by his managing general agent that customers' checks should be made payable to the insurance company and submitted with a new business application to the managing general agent, who would then deposit the checks into the insurer's trust account, do underwriting on the application, and issue a commission check to the agent. The defendant was not supposed to take any money out of original premium checks. The record shows that the managing general agent did not receive an application or premium from the defendant or Iola Coatney.

The information alleged that on or between October 10, 1986, and December 23, 1986, the defendant "did obtain property of Iola Coatney, valued at more than $1,000, by deception, to-wit: did create or reinforce a false impression as to law, value, intention, or other state of mind."

Neb. Rev. Stat. § 28-512 (Reissue 1985) provides:

> A person commits theft if he obtains property of another by deception. A person deceives if he intentionally:
>
> (1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise . . .

Theft is a Class III felony when the value of the thing involved is over $1,000. Neb. Rev. Stat. § 28-518 (Reissue 1985).

In determining the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Botts*, 232 Neb. 802, 442 N.W.2d 384 (1989).

The evidence of the State was sufficient, if believed, to show that between October 10 and December 23, 1986, the defendant engaged in a continuing scheme to obtain money from Iola Coatney by creating the false impression that she was purchasing insurance from him. The record supports the jury's finding that the defendant wrongfully obtained $7,974 from Mrs. Coatney over the alleged period of time. The offense described in § 28-512(1) may take place over a period of time.

The defendant complains that he should have been charged with four separate offenses instead of one offense involving four transactions and that it was plain error for the trial court "to submit the allegation of theft by deception aggregating all four transactions as one." Brief for appellant at 12-13. There was no prejudice to the defendant in charging him with but one

offense instead of four offenses for which he could have received separate sentences. The first assignment of error is without merit.

The second and third assignments of error relate to the defendant's contention that he received ineffective assistance of counsel at trial because his trial counsel failed to file a motion for a new trial, thus limiting the issues which might be presented to this court.

To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Wiley*, 232 Neb. 642, 441 N.W.2d 629 (1989); *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989). The defendant has failed to show how he was prejudiced in any way because of the failure to file a motion for new trial. The only alleged error of which he has complained, the insufficiency of the evidence to sustain the conviction, is without merit.

Furthermore, Neb. Rev. Stat. § 25-1912.01 (Reissue 1985) provides:

> (1) A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record.
>
> (2) When an action has been tried before a jury a motion for a new trial shall not be a prerequisite to obtaining appellate review of the sufficiency of the evidence....

In light of § 25-1912.01, the defendant was not prejudiced by his counsel's failure to file a motion for new trial.

Finally, the defendant claims that the probation he received was an excessive sentence.

The defendant is 44 years of age and has a college education. He was convicted of petit larceny in 1974 and of theft by unlawful taking in 1983. In 1985, three counts of theft by deception filed in Saline County were dismissed, apparently because the complaining witnesses desired to accept restitution from the defendant and avoid a trial. On April 19, 1988, two

counts of theft by deception were filed in Lancaster County. The presentence report does not show the disposition of these counts.

The offense of which the defendant was convicted is a Class III felony with a maximum penalty of 20 years' imprisonment, a $25,000 fine, or both, and a minimum penalty of 1 year's imprisonment. The defendant was sentenced to 5 years' probation, including 90 days in jail and payment of full restitution to Mrs. Coatney.

The record shows that the sentence of probation was imposed so that the defendant could make full restitution to Mrs. Coatney. A sentence of probation, as opposed to a sentence of imprisonment, is a matter within the discretion of the trial court and will not be set aside on appeal absent an abuse of discretion. See, *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988); *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982). The sentence imposed was not excessive.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT R. NASH, APPELLANT.

444 N.W.2d 914

Filed September 1, 1989. No. 88-865.

1. **Controlled Substances: Circumstantial Evidence: Proof.** The existence of and dealing with narcotics may be proved by circumstantial evidence. There need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence is sufficient to support an inference that the material in question was narcotics.
2. **Controlled Substances: Convictions: Circumstantial Evidence: Witnesses: Proof.** Proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient to sustain a criminal conviction resulting from a drug prosecution, so long as this evidence establishes the identity of the drug beyond a reasonable doubt.
3. **Controlled Substances: Proof: Evidence.** Some of the factors to be considered in determining whether the State has met its burden of proving the identity of a controlled substance beyond a reasonable doubt include: (1) the privacy or

secretiveness of the transaction, (2) references made to the drug by the defendant and others, (3) testimony by witnesses who have a significant amount of experience with the drug in question, (4) high price paid for the substance, (5) behavior characteristic of sale and use of a particular substance, (6) prior involvement by the defendant in drug trafficking, (7) corroborating testimony by officers or other experts as to the identification of the substance or the expected effects of the substance, and (8) sensory identification of the substance if the substance is sufficiently unique.

4. **Wiretaps: Proof.** The ultimate burden of showing an unlawful interception rests upon the party against whom the fruits of the electronic surveillance are offered.
5. **Wiretaps.** It is not necessary for the State to utilize all investigative techniques before making an application for a wiretap. It is sufficient that the State show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation.
6. **Wiretaps: Affidavits.** The application for a wiretap must contain a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a wiretap is authorized.
7. _____: _____. An affidavit in support of an application for a wiretap is to be tested in a practical and commonsense fashion.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Richard J. Bruckner for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Robert R. Nash, was convicted of unlawful possession of methamphetamine and was sentenced to 8 months in jail and fined $1,000 and costs. He has appealed and contends that the evidence was insufficient to sustain the verdict and that the trial court erred in overruling his motions to suppress wiretaps.

The evidence of the State consisted largely of the testimony of Kevin Florom, who was an eyewitness to the sale of methamphetamine to the defendant. Florom is 30 years old and is a resident of North Platte, Nebraska. Florom testified that he has used drugs since he was 16 years old and sold drugs from 1974 until 1986.

With respect to methamphetamine, Florom stated that he had used the drug over 100 times and that it affected his body by raising his body temperature, decreasing his appetite, and allowing him to go without sleep for up to a week at a time. He described methamphetamine as a white powder with a crystalline or chunky appearance, occasionally with a yellow tint to it, and with a certain odor that "you can't mistake for anything else." In addition, the drug has a bitter taste and may be smoked, dissolved in water and drunk, or injected. Florom stated that he himself preferred injection because of the instant high achieved by injection. When Florom sold methamphetamine, it was referred to as crank or crystal, which are simply two names for the same substance.

Florom stated that in 1986 he was a seller of methamphetamine for Monte Allen and William Roach, Jr., and at that time was living with Roach in a trailer house behind Bud's Repair on East 5th Street in North Platte. Allen was residing in Fort Collins, Colorado, and Florom had been acquainted with him when Allen lived in North Platte. Florom had been to Allen's home in Colorado to pick up crystal for distribution in North Platte. In addition, Allen had delivered crystal to North Platte on more than one occasion.

Florom testified that he met the defendant in 1980 when Florom was working as a bartender at the Platte Bar. Their relationship at this time was not related to drug dealings, and in fact the parties did not socialize together. Florom stated that although he personally never sold crystal to Nash, he was present when Allen sold the drug to Nash on December 1, 1986. Florom claimed that he had introduced Allen to Nash. According to Florom, he placed a call to Nash to inquire whether Nash was interested in buying any crystal, as Allen had a quantity of crystal that he needed to sell. Nash told Florom to come over to his house and see him, which both Florom and Allen then did.

All three individuals sat down at a table, and Allen reached into his pocket and pulled out an "eight ball" of crystal and handed it to the defendant. Florom testified that an eight ball of crystal is 3 1/2 grams, or an eighth of an ounce, of methamphetamine. Nash then took his bowie knife and stuck it

into the bag, sampled the drug, and stated that "it's not too bad." Florom stated that earlier in the day, he, Allen, and Roach had divided the crystal into smaller quantities and had injected some of the drug at that time. Apparently, the drug injected by Florom was from the same lot of methamphetamine that later was broken down into 1/8-ounce bags and distributed to Nash.

In terms of payment for the crystal, Allen told the defendant it would cost him $285, which the defendant paid to Allen at Florom's trailer behind Bud's Repair. Florom stated that all events transpired on December 1, 1986, in North Platte, Lincoln County, Nebraska.

Florom was not working for law enforcement and had never been an undercover informant.

The first time that Florom told authorities of the December 1 incident was in February of 1987, when he was in the Hastings Regional Center for treatment of drug and alcohol problems.

On cross-examination, Florom testified that he had been charged in March of 1988 with either distribution of methamphetamine or conspiracy to do so, but as of the date of trial he had not gone to court on the charge. In addition, he has been charged with two counts of felony nonsupport dating back to December of 1987. Since leaving the regional center, Florom has smoked marijuana three or four times and was arrested on July 26, 1988, for disturbing the peace and resisting arrest.

Florom's testimony concerning the sale of methamphetamine to the defendant on December 1, 1986, was corroborated by the testimony of James Parish, Melvin Messersmith, and Gerard Ruiz, members of the Nebraska State Patrol who were involved in the drug investigation, and by the record of a telephone conversation between the defendant and Florom.

Parish testified that he was involved in the investigation of Nash, beginning with surveillance, and later was made supervisor in charge of the investigation. The investigation of Nash began when the patrol received information from informants regarding numerous persons involved in trafficking in cocaine and methamphetamine in Lincoln County,

Nebraska. As a part of the investigation, a wiretap was installed on a telephone in the defendant's residence at 77 Maplewood Circle in North Platte. Several hundred calls were monitored at the Nash residence, and on December 1, 1986, an evidence call was monitored at the defendant's residence. An evidence call is a call of criminal nature and involves suspects, a particular transaction, or the discussion of criminal activity.

The December 1, 1986, call, which occurred at about 11:30 a.m., was monitored by Investigator Messersmith. Messersmith stated that the conversation indicated that there was a desire for a transaction involving crystal (methamphetamine) to take place. At trial, Messersmith read from the transcript of the recorded telephone conversation, which, with obscenity and vulgarity deleted, was as follows:

> Nash answered the phone, "Nash." Florom: "Nashville. What are you doing?" Nash: ["]Oh, just sitting here watching T.V.["] Florom: "This is Kevin Florom." Nash: "Sure." Florom: "Well, how are ya doing." Nash: ["]Oh, pretty good, I'm trying to get to Cheyenne, but I don't think I'm going to get the job done." Florom: "Not going to get there today, hu [sic]?" Nash: "Na, it's ------ weather." Florom: "Ah, ya, ------ icy roads probably." Nash: "Ya, it's well I was gonna fly out." Florom: "Oh ya." Nash: "Ya they've got icy conditions." Florom: ["]Oh, they've got you grounded." Nash: "Ya, it's about 1500 feet going out of here ---- ------- storm front is just 60 miles west of here." Florom: "Ah really." Nash: "But ya know, getting there, I'd pick up ice sure as ----, so[.]" Florom: "Ya, you bet you would, you'll have probably enough to do the damage." Nash: "Ya, well I can't fly in that ----." Florom: "Ya." Nash: ["]What's going on." Florom: "Ya, I just was wondering if you might be interested in any crystal." [Nash:] "Um, why don't ya come over to the house and talk to me." Florom: "Okay, I was just, I was just going to ask if you was going to be home." Nash: "Ya." Florom: "But I didn't know if you'd understand ya know what I mean." Nash: "Ya, why don't ya come over and visit me for a while." Florom: "I will do that, I'll be right there." Nash: "Well okay." Florom:

"Thank ya." Nash: "Bye." Florom: "Uh-huh."
The actual tape recording was received in evidence.

Within several minutes of the call, Messersmith notified Parish that a criminal call had been intercepted. Parish immediately contacted Investigator Ted Mashek and arrangements were made for surveillance of the Nash residence. Parish then obtained a camera and accompanied Mashek to a location in the vicinity of 77 Maplewood Circle. Ruiz was also notified. Parish and Mashek drove to a location on Bare Street, which allowed them to observe 77 Maplewood Circle and any traffic leaving that area. Photographs were taken of vehicles which were observed at the Nash residence. A black Chrysler was observed, and the officers followed that vehicle to a Kwik Stop, where they saw Allen enter the Kwik Stop. After following the car for a short period, the officers terminated their surveillance.

On February 12, 1987, Investigator Robert Zeiler and Parish interviewed Florom, one of the participants in the December 1, 1986, incident, to determine whether he would cooperate with their investigation and to clarify details as to what had transpired on December 1. Florom agreed to cooperate and gave the officers a statement without being given any "deal" or promise in return. Florom made a second statement in December 1987 in which he admitted some inaccuracies in his first statement.

Roach and Allen were also contacted, but they were unwilling to cooperate with the patrol's investigative efforts.

The entire investigation ran from October 1985 until the middle of February 1987, with the focus on Nash being from November 1986 until February 1987. Nash was initially arrested in June of 1987.

Ruiz testified that he lived at 66 Maplewood Circle in North Platte. His involvement in the Nash investigation involved keeping track of Nash's home, observing vehicles and identifying people at the Nash home, and taking photographs. On December 1, 1986, Ruiz was asked to watch Nash's residence and to photograph any individuals or cars that were seen at the home. A photograph taken by Ruiz shows a black car with Utah plates, occupied by two men, which drove up to

Nash's garage and entered it. Fifteen to twenty minutes later, the men left the home and drove away.

The evidence of the State which has been summarized was sufficient, if believed, to permit the jury to find the defendant guilty beyond a reasonable doubt. Florom's credibility was a question for the jury.

The fact that none of the methamphetamine sold to the defendant by Allen in the presence of Florom on December 1, 1986, was seized and later determined by scientific analysis to be methamphetamine does not make the evidence insufficient to sustain the verdict. Florom's extensive experience in dealing with drugs was sufficient to permit him to testify that the drug sold to the defendant was methamphetamine.

> "Just as with any other component of the crime . . . the existence of and dealing with narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished ground for inferring that the material in question was narcotics."

United States v. Atkins, 473 F.2d 308 (1973). See, also, *United States v. Sweeney*, 688 F.2d 1131 (1982).

In *State v. Watson*, 231 Neb. 507, 437 N.W.2d 142 (1989), almost a companion case to this case, we held:

> Proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient to sustain a criminal conviction resulting from a drug prosecution, so long as this evidence establishes the identity of the drug beyond a reasonable doubt.

(Syllabus of the court.) We also held in *Watson, supra*, that

> [s]ome of the factors to be considered in determining whether the State has met its burden of proving the identity of a controlled substance beyond a reasonable doubt include: (1) the privacy or secretiveness of the transaction, (2) references made to the drug by the defendant and others, (3) testimony by witnesses who have a significant amount of experience with the drug in question, (4) high price paid for the substance, (5) behavior characteristic of sale and use of a particular

substance, (6) prior involvement by the defendant in drug trafficking, (7) corroborating testimony by officers or other experts as to the identification of the substance or the expected effects of the substance, and (8) sensory identification of the substance if the substance is sufficiently unique.

(Syllabus of the court.)

In this case there was substantial evidence concerning the privacy of the transaction, the references to the drug by the defendant and others, the significant experience of the defendant and Florom with the drug, the high price paid, the prior involvement of the defendant in drug trafficking, and the corroborating testimony by the officers.

The defendant's other assignment of error relates to the alleged overruling of the defendant's motions to suppress evidence obtained from the defendant by means of a wiretap. The transcript contains no motion by the defendant, or an order overruling a motion, relating specifically to a wiretap. The reference in the defendant's brief is to a motion filed January 21, 1988, relating to statements obtained from the defendant by State Patrol investigators during an interview with the defendant in the presence of his counsel. The January 21, 1988, motion was sustained by the trial court, and upon appeal by the State to a single judge of this court, the order was affirmed. *State v. Nash*, 228 Neb. 69, 421 N.W.2d 41 (1988).

The record shows that on June 3, 1986, an application was made for an order authorizing the interception of wire or oral communications at the residence of Richard Watson in North Platte, Nebraska, and an order granting the application was signed on that date.

On November 4, 1986, an application for a similar order for the residence of the defendant was made, and an order granting the application was signed on that date.

The November 4, 1986, application was supported by the affidavit of Mashek. The affidavit alleged that the purpose was to obtain information concerning drug transactions involving the defendant, other named persons, and other persons whose identities were unknown. The November 4 affidavit referred to the ongoing investigation and related in detail what other means

had been utilized or considered, including informants, the possibility of infiltration, evidence obtained through the wiretap at the Watson residence, and surveillance. The affidavit further explained why other methods would not prove successful.

The affidavit satisfied the requirements of Neb. Rev. Stat. § 86-705 (Reissue 1987) and was sufficient to justify the order signed on November 4, 1986.

The defendant's principal contention, that the wiretap was illegal, is based on his argument that the showing of the use of alternative methods, particularly surveillance, was inadequate.

> The ultimate burden of showing an unlawful interception rests upon the party against whom the fruits of the electronic surveillance are offered. *United States v. Phillips*, 540 F.2d 319 (8th Cir. 1976), *cert. denied* 429 U.S. 1000, 97 S. Ct. 530, 50 L. Ed. 2d 611 (interpreting the federal wire interception and interception of oral communications provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. (1976), on which our telephonic communications act is patterned).

State v. Brennen, 214 Neb. 734, 742, 336 N.W.2d 79, 84 (1983). See *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984).

In *State v. Lozano*, 209 Neb. 772, 774-75, 311 N.W.2d 529, 531 (1981), we said:

> In *State v. Kolosseus*, 198 Neb. 404, 415, 253 N.W.2d 157, 163 (1977), we said: " 'There is no requirement that every investigative methodology be exhausted prior to application for a [wiretap] authorization. . . . It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation.' . . . We conclude that what is required under the first alternative is that the application make a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a tap is authorized." In *State v. Holmes and Beardslee*, 208 Neb. 114, 121, 302 N.W.2d 382, 386 (1981), we held that "it is not necessary for the State to

> utilize all investigative techniques before making an application for a wiretap." We further noted there that " 'wire tap "procedures were not to be routinely employed as the initial step in criminal investigation," but it is equally true "that the statute does not require the government to use a wire tap only as a last resort." United States v. Kerrigan, 514 F.2d 35 (9th Cir. 1975); United States v. Staino, 358 F.Supp. 852, 856-7 (E.D. Pa. 1973).' " *Id.* at 122, 302 N.W.2d at 386.

An affidavit in support of an application for a wiretap is similar to an affidavit in support of an application for a search warrant and is to be tested in a practical and commonsense fashion. *State v. Holmes and Beardslee*, 208 Neb. 114, 302 N.W.2d 382 (1981).

This case involved an extensive investigation into the drug traffic in North Platte, Nebraska, that was carried on over a relatively long period of time. As in *State v. Hinton*, 226 Neb. 787, 415 N.W.2d 138 (1987), *Lozano, supra*, and *Holmes and Beardslee, supra*, law enforcement officials were attempting to identify the sources of the drugs, and the defendant's activities were but a part of the overall investigation.

The showing made in this case, when tested in accordance with the rules stated above, was adequate to support the order authorizing the wiretap.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KAREN ARVIZO, APPELLANT.
444 N.W.2d 921

Filed September 1, 1989. No. 89-318.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed as modified.

Barry Waid, Hall County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Marie C. Pawol for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

In an amended information, defendant was charged, in one count, with a violation of Neb. Rev. Stat. § 28-611(1)(b) (Reissue 1985), in that defendant had obtained value from Management Investment Industries, Inc., and issued that corporation a check for $324 on Home Federal Savings and Loan of Grand Island, Nebraska, when defendant had no funds in that institution.

On January 12, 1989, defendant pled guilty to that charge. On March 3, 1989, defendant was sentenced to 6 months in the Hall County jail, "said sentence to run consecutively with sentences from Adams and Buffalo Counties," and to pay the costs of prosecution, and the court ordered that "restitution in the sum of $3278.17 be made to the Clerk of the District Court within one (1) year . . . ."

Defendant timely appealed to this court and assigns only one error: "The sentence imposed on March 3, 1989, is excessive and an abuse of discretion." For the reasons hereafter stated, we affirm, but modify, the sentence.

The jail time set out in the sentence cannot be considered excessive. A sentence imposed within the limits prescribed by statute will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988). In the case before us, defendant was charged with violating § 28-611(1)(b), a Class IV felony. The possible punishment for such a violation is up to a maximum of 5 years' imprisonment, plus a possible fine. Defendant admitted her actions and stated her only excuse was that she was a compulsive gambler.

At the time of defendant's plea to this charge, there were in the hand of the Hall County attorney at least 20 other no-funds checks written by defendant. As shown by the consecutive nature of her sentence, defendant had been convicted of similar acts in Adams and Buffalo Counties. Defendant's sentence was

not excessive insofar as her imprisonment is concerned.

Defendant also contends, however, that the court erred in requiring her to make restitution of $3,278.17 when she had been convicted of writing a no-fund check of $324. With that contention we agree.

Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1988) provides:

> A sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. Whenever the court believes that restitution may be a proper sentence or the victim of any offense or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim.

The "victims" of defendant's actions may have lost an additional $2,954.17 beyond the loss sustained by the victim "of the offense for which the defendant has been convicted," but such losses may not be the subject of a restitution order in connection with a different offense.

The judgment and sentence of the Hall County District Court are affirmed in all respects, except the restitution required to be paid is reduced to $324, to be repaid within 1 year to the victim, Management Investment Industries, Inc.

AFFIRMED AS MODIFIED.

ALAN GATZEMEYER, APPELLANT, V. NELIGH TOWNSHIP AND ROBERT MULLER, APPELLEES.

445 N.W.2d 593

Filed September 15, 1989. No. 87-881.

1. **Motor Vehicles: Negligence.** The rule that it is generally negligence as a matter of law to operate a motor vehicle on a public street or highway in such a manner that the vehicle cannot stop or turn aside without colliding with an object or obstruction on the street or highway within the operator's range of vision is not

applicable where reasonable minds might differ as to whether the motorist was exercising due care under the circumstances.

2. **Summary Judgment.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, this court takes the view of the evidence most favorable to the party against whom the motion is directed and gives that party the benefit of all favorable inferences drawn from the evidence.
4. **Motor Vehicles: Negligence.** Neb. Rev. Stat. § 39-606 (Reissue 1988) does not absolve persons engaged in road work from obeying the fundamental premise that an operator of a vehicle is under a continuing duty to exercise reasonable care for the safety of others.

Appeal from the District Court for Cuming County: RICHARD P. GARDEN, Judge. Reversed and remanded for further proceedings.

N. Richard Willia and Theodore E. Karpuk, of Margolin, Gildemeister, Willia, Mugan & Keane, for appellant.

C.J. Gatz, of Jewell, Gatz, Collins, Dreier, Fitzgerald & Balsiger, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

MULLEN, D.J.

The plaintiff, Alan Gatzemeyer, appeals from the trial court's granting of summary judgment in favor of the defendants, Neligh Township and Robert Muller. As a matter of law, the trial court found Gatzemeyer was negligent and the defendants were not negligent. Gatzemeyer claims the court erred in finding (1) he was negligent as a matter of law; (2) his negligence was a bar to recovery as a matter of law; and (3) the defendants were not negligent as a matter of law. We reverse and remand for further proceedings.

For the purposes of the summary judgment hearing, the trial court received 11 exhibits into evidence. The exhibits included the pleadings and the depositions of the parties.

Gatzemeyer stated in his deposition that on October 2, 1985, at approximately 5:30 p.m., he drove his motorcycle west on

the township road between his house and a pasture to feed cattle. The road was roughly 22 feet wide. Gatzemeyer was driving the motorcycle on the right-hand side tire track on the north side of the westbound lane. Upon cresting a hill, Gatzemeyer saw a road maintainer, owned by the defendant Neligh Township and operated by the defendant Robert Muller, traveling east in the westbound lane. At that time the maintainer was 40 to 50 feet in front of Gatzemeyer. Muller stated in his deposition that he first saw the motorcycle when it was 25 feet away. At that time Gatzemeyer estimated his speed at approximately 40 miles per hour; the maintainer's speed was approximately 5 miles per hour. In his deposition, the plaintiff stated he had seen the maintainer working on the road several times in the past, but he had never seen it when it was moving against traffic.

The maintainer was a "Caterpillar 140 G," approximately 13 1/2 feet high, with an attached 16-foot blade. According to Muller, the revolving yellow beacon light on the top of the maintainer was operating at the time, although Gatzemeyer stated in his deposition he did not see the light. The edge of the blade was approximately 2 feet from the north edge of the road and angled so that it extended another 12 feet into the road. There were no warning signs or devices in place to warn oncoming traffic of the maintainer's operation. According to Muller, the only notice oncoming traffic would have of his presence was the windrow in the middle of the road.

To pass to the left, Gatzemeyer would have had to swerve 8 to 10 feet to the left and jump the windrow, which was 10 inches high and 12 to 16 inches wide. In a statement attached to the plaintiff's response to defendants' request for production of documents, Muller stated, "Mr. Gatzemeyer had no choice but to drive into the ditch as he could not have avoided the maintainer blade had he attempted to swerve to the left into the other lane of travel . . . ."

Gatzemeyer passed the maintainer on the right, between the blade and the edge of the road; however, he entered the ditch shortly after passing the blade. Although he avoided hitting the maintainer, Gatzemeyer collided with a haystack in the ditch and was allegedly injured.

Gatzemeyer claimed the defendants were negligent in (1) operating the maintainer eastbound in the westbound lane of traffic; (2) failing to warn oncoming traffic of the presence of the maintainer in that lane of traffic; (3) failing to exercise ordinary, reasonable, or due care commensurate with the danger reasonably to be anticipated under the existing circumstances; (4) operating a vehicle on a highway at a greater width than allowed by Neb. Rev. Stat. § 39-6,177 (Reissue 1988); (5) operating the maintainer in a careless, reckless, or willfully reckless manner, in violation of Neb. Rev. Stat. §§ 39-669, 39-669.01, and 39-669.03 (Reissue 1988); and (6) failing to place flags or emergency reflectors in a position that would forewarn others of a dangerous situation, in violation of Neb. Rev. Stat. § 39-6,164 (Reissue 1984).

The defendants denied they were negligent and claimed Gatzemeyer's negligence was the cause of the accident. The specific claims of negligence against Gatzemeyer included failure to (1) maintain a proper lookout, (2) maintain proper control, (3) operate the motorcycle in a manner that would enable him to stop within his range of vision, (4) operate his vehicle at a proper rate of speed under the existing conditions, and (5) stop or turn aside prior to the collision. The defendants further claimed such negligence was more than slight when compared with any negligence on the part of defendants.

The defendants moved for summary judgment. The trial judge found (1) the defendants were maintaining the township road at the time of the accident; (2) it was not shown the road was being maintained in a negligent manner; and (3) Gatzemeyer was negligent as a matter of law because he was operating his motorcycle at such a rate of speed that he could not safely stop or turn aside in time to avoid an obstruction within his range of vision.

Defendants contend they were not negligent, as a matter of law, based upon Neb. Rev. Stat. § 39-606 (Reissue 1984), which stated:

> Unless specifically made applicable, the provisions of sections 39-601 to 39-6,122 [Nebraska's rules of the road], except those provisions relative to careless driving and to reckless driving, shall not apply to:

> (1) Persons, teams of draft horses, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work . . . .

The record is clear that Muller was engaged in "work upon the surface of a highway." Therefore, he was not obligated to follow the statutory rules of the road. However, such fact did not absolve him from obeying the fundamental premise that an operator of a vehicle is under a continuing duty to exercise reasonable care for the safety of others. *Chmelka v. Continental Western Ins. Co.*, 218 Neb. 186, 352 N.W.2d 613 (1984).

The defendant Muller operated the road maintainer on a steep hill against the flow of traffic without any warning to oncoming traffic. Whether he exercised reasonable care for the safety of others in doing so is a question for the trier of fact. If there were reasonable alternatives to achieve the result sought or if a warning signal would have been feasible, the defendants could be held liable for not exercising reasonable care in the performance of their duties. There remains a question of fact as to any negligence on the part of the defendants.

Defendants argue Gatzemeyer was negligent as a matter of law in driving his vehicle at such a speed that he was unable to stop or turn aside in time to avoid the maintainer, which was discernible within his range of vision.

Under Nebraska law, it is generally negligence as a matter of law to operate a motor vehicle on a public street or highway in such a manner that the vehicle cannot stop or turn aside without colliding with an object or obstruction on the street or highway within the operator's range of vision. *Converse v. Morse*, 232 Neb. 925, 442 N.W.2d 872 (1989); *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). This rule, however, is not applicable where reasonable minds might differ as to whether the motorist was exercising due care under the circumstances. *Fink v. Meister*, 188 Neb. 248, 196 N.W.2d 122 (1972).

A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt. *Sherbeck v. Schaper*, 232 Neb. 754, 442 N.W.2d 364 (1989).

In reviewing a summary judgment, this court takes the view of the evidence most favorable to the party against whom the motion is directed and gives that party the benefit of all favorable inferences drawn from the evidence. *Sherbeck v. Schaper, supra.*

In considering a motion for summary judgment, the court examines the evidence to determine if any issue of material fact exists, not to decide how a particular issue of fact should be resolved. *Allan v. Massey-Ferguson, Inc.*, 221 Neb. 528, 378 N.W.2d 664 (1985); *Roy v. Morford*, 216 Neb. 818, 346 N.W.2d 392 (1984).

We cannot say reasonable minds could draw only one conclusion from the facts of this case. The general rule is not applicable here, and the determination of any negligence on the part of Gatzemeyer is a factual question to be answered by a trier of fact.

Therefore, it was error for the court to grant summary judgment when there remain questions of fact as to the negligence of the parties involved in the matter.

Since the cause is remanded on other grounds, discussion of the plaintiff's second assignment of error is moot.

As questions of material fact exist concerning the negligence of the various parties, the trial court's grant of summary judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FIRST SECURITY SAVINGS, APPELLANT, V. AETNA CASUALTY AND SURETY COMPANY, APPELLEE.

445 N.W.2d 596

Filed September 15, 1989. No. 87-897.

1. **Insurance: Bonds: Notice: Time: Proof.** In order for an insured to recover under a discovery bankers blanket bond, the insured must establish that it (1) discovered the loss within the period of the bond's existence, (2) furnished written notice to the underwriter at the earliest practicable moment after discovery of the loss, and (3) furnished the underwriter proof of loss with full particulars within the time specified by the bond.
2. **Summary Judgment.** Summary judgment is appropriate where there exists no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

James B. Cavanagh, of Erickson & Sederstrom, P.C., for appellant.

Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The plaintiff-appellant, First Security Savings, a state-chartered industrial loan and investment company, challenges the district court's sustainment of defendant-appellee Aetna Casualty and Surety Company's motion for summary judgment in this suit on a discovery bankers blanket bond, pursuant to the terms of which Aetna undertook to indemnify First Security for certain losses. We affirm.

So far as is relevant to this inquiry, the bond covered any loss which resulted directly from the dishonest or fraudulent acts of the insured's employee and which was discovered during the period of the bond's existence, irrespective of when the loss occurred. The bond required, among other things, that the insured "within six months after such discovery furnish to the

Underwriter affirmative proof of loss with full particulars." The bond further provided:

> At any time prior to the termination or cancellation of this bond as an entirety, whether by the Insured or the Underwriter, the Insured may give to the Underwriter notice that it desires under this bond an additional period of twelve months within which to discover loss sustained by the Insured prior to the effective date of such termination or cancellation and shall pay an additional premium therefor.

The subject bond became effective on April 11, 1977, was renewed for an additional 3 years as of April 11, 1980, and, since First Security elected not to purchase the extended coverage available to it under the last-mentioned bond provision, was terminated "effective from and after the 11th day of April, 1983." (According to *First Sec. Sav. v. Kansas Bankers Sur. Co.*, 849 F.2d 345 (8th Cir. 1988), First Security obtained a new bond from a different insurer effective April 11, 1983, which was held not to cover the losses sought in that case because they were determined to have been discovered before the new bond took effect.)

First Security's petition in this case alleges that its president, one James Gillette, "dishonestly and fraudulently misappropriated and converted" its funds in a variety of ways. Aetna denied liability on the grounds, among others, that First Security did not discover any loss within the period of the bond's existence and, further, failed to provide a timely proof of loss.

The evidence establishes that First Security's first communication with Aetna concerning this matter was by a letter dated April 13, 1983, which advised that First Security had been informed by regulatory authorities of "possible violations" of law by Gillette related to First Security Bank and Trust Company, an affiliate of First Security, and that it was "likely that similar misconduct in connection with First Security Savings Company occurred. If so, a loss covered by your bond will undoubtedly result."

By cover letter dated October 11, 1983, First Security submitted to Aetna a proof of loss in the amount of $89,194.02

relating to First Security's discovery of Gillette's allegedly fraudulent involvement in the Gillette-Morton transaction. The proof of loss is dated October 11, 1983, at the top and October 12, 1983, at the bottom and is stamped as received by Aetna on October 17, 1983. The proof of loss states, "This particular loss was first discovered in early May, 1983 . . . ."

Thereafter, on March 29, 1984, Aetna received a second proof of loss, dated March 5, 1984, and entitled "Initial Proof of Loss," in which First Security claimed the amount of $2,176,861.60 as the result of Gillette's allegedly fraudulent involvement in the Copple transactions. This document also reasserted the loss which was the subject of the October 1983 communication.

In *First Security Bank v. New Hampshire Ins. Co.*, 232 Neb. 493, 441 N.W.2d 188 (1989), we held that in order for an insured to recover under a discovery bankers blanket bond, the insured must establish that it (1) discovered the loss within the period of the bond's existence, (2) furnished written notice to the underwriter at the earliest practicable moment after discovery of the loss, and (3) furnished the underwriter proof of loss with full particulars within the time specified by the bond.

Resolving the confusion as to the date of the October 1983 proof of loss in favor of First Security and thus assuming that that document was submitted seasonably, the fact remains that the loss described therein was, by First Security's own admission, not discovered within the period of the bond's existence. Thus, the loss which is the subject of that communication is not covered by the bond.

The March 1984 proof of loss clearly was not submitted to Aetna within 6 months of the termination of the bond as was required; consequently, the losses reported in the March letter are likewise not covered. First Security's argument that the March 1984 proof of loss merely amended and thus related back in time to its October 1983 submission is untenable. The later submission added a series of transactions which were not mentioned in the earlier submission and increased First Security's claim by more than $2 million. There can be no question but that the March 1984 letter constituted a new, and untimely, proof of loss.

The record discloses that there exists in this case no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that Aetna, as the moving party, is entitled to judgment as a matter of law. Accordingly, the district court properly granted Aetna's motion for summary judgment. *Gatzemeyer v. Neligh Township, ante* p. 329, 445 N.W.2d 593 (1989); *State Farm Fire & Cas. Co. v. Victor,* 232 Neb. 942, 442 N.W.2d 880 (1989).

AFFIRMED.

IN RE INTEREST OF J.H., H.H., L.H., M.H., AND R.H., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. V.H., APPELLANT.

445 N.W.2d 599

Filed September 15, 1989. No. 88-513.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the court to reach a conclusion independent of the findings of the trial court. Where evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof: Appeal and Error.** A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply with a rehabilitative plan ordered by the juvenile court, and it is in the best interests of the children that parental rights be terminated.
3. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child presents an independent reason justifying termination of parental rights.
4. **Parental Rights.** The juveniles' best interests are the primary considerations in considering whether parental rights should be terminated. Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require termination of the parental rights.

5. **Parental Rights: Juvenile Courts.** The juvenile court has discretionary power to prescribe a reasonable plan for parental rehabilitation to correct conditions underlying the adjudication that a child is a juvenile within the juvenile code.
6. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Dean M. Johnson for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Bridgitt Brochtrup Blankenau for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

MCGINN, D.J.

V.H. appeals from an order of the separate juvenile court of Douglas County terminating her parental rights with regard to five of her children, J.H., H.H., L.H., M.H., and R.H. We affirm.

On April 4, 1985, a petition to terminate the parental rights of V.H. was filed in the separate juvenile court of Douglas County. The petition alleged that J.H. (age 10), H.H. (age 9), L.H. (age 7), A.B. (age 4), M.H. (age 3), and R.H. (age 1) were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), lacking proper parental care by reason of the fault or habits of V.H., the natural mother, and within the meaning of Neb. Rev. Stat. § 43-292(2) (Reissue 1988), having a natural parent, V.H., who has substantially and continuously or repeatedly neglected said children and refused to give the necessary parental care and protection.

At the hearing on the petition, V.H. admitted several of the allegations contained in the petition. The court found J.H., H.H., L.H., A.B., M.H., and R.H. to be within §§ 43-247(3)(a) and 43-292(2) and retained jurisdiction over the children, with physical custody of all the children except A.B. given to the Department of Social Services. A.B. was placed in the physical custody of D.B., the natural father. The court took

the motion to terminate V.H.'s parental rights under advisement.

Following a dispositional hearing on September 4, 1985, the court established a rehabilitation plan which required V.H. to (1) undergo a chemical dependency evaluation and psychological and psychiatric evaluations, and obtain the treatment indicated; (2) maintain her employment and provide verification of income on a monthly basis; (3) obtain suitable housing (at a minimum, a one-bedroom residence) within 60 days and maintain the same residence for 60 consecutive days before the next hearing, maintain adequate housekeeping standards and furnishings, and provide monthly rent receipts; (4) notify the court of any change in employment or residence within 48 hours; and (5) meet with the juvenile court probation officer once a month to establish goals for the month. V.H. was also granted reasonable visitation with the children, to be arranged by Child Protective Services.

The first review hearing was held January 6, 1986. After evidence was presented on V.H.'s compliance with the rehabilitation plan, the court terminated its jurisdiction over A.B. and granted permanent custody to D.B., the natural father. The court retained jurisdiction over the remaining five children and continued the rehabilitation plan with some modifications. First, V.H. was ordered to participate in a YWCA alcohol awareness program. Second, the court ordered counseling for J.H., H.H., and L.H. to deal with behavior problems the children were experiencing, with V.H. participating as required. Last, the visitation schedule was adjusted to deal with problems V.H. had controlling the children when she visited all five at one time. Visitations were split so that V.H. visited M.H. and R.H. weekly and visited J.H., H.H., or L.H. once every 3 weeks on a rotating basis.

Further review hearings were held on May 6, 1986, July 31, 1986, October 31, 1986, and May 18, 1987. At each hearing, evidence was presented showing the extent of V.H.'s compliance with the rehabilitation plan since the last hearing. After each hearing, the court retained jurisdiction over the five children and continued the rehabilitation plan in essentially an identical form. Beginning with the order after the May 6, 1986, hearing,

V.H. was ordered to attend relinquishment counseling aimed at helping her assess her capabilities to parent and determine if voluntary relinquishment was in the best interests of the children.

A motion for termination of parental rights was filed on September 18, 1987. On January 19, 1988, V.H. moved for increased visitation with the children. A hearing on the motions began on February 10, 1988, and continued on April 14, with the motions heard in the order in which they were filed. At the conclusion of the hearing, the juvenile court found there was clear and convincing evidence to support the motion for termination and ordered V.H.'s parental rights over J.H., H.H., L.H., M.H., and R.H. terminated. Having terminated V.H.'s parental rights, the court took no action on the motion for additional visitation.

V.H. filed a motion for new trial and a motion for visitation pending a determination of the motion and during the pendency of any appeal. Both motions were overruled. This appeal followed.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the court to reach a conclusion independent of the findings of the trial court. Where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of E.B.*, 232 Neb. 653, 441 N.W.2d 637 (1989); *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989).

This case began on March 21, 1985, when the Omaha Police Division received an anonymous telephone call concerning minor children left alone in a residence at 2411 Laurel Avenue in Omaha, Nebraska. Upon investigation, the police found J.H., H.H., L.H., A.B., M.H., and R.H. alone in the residence. The residence was described as being in a state of total disarray. The burners on the electric stove were turned on and were red hot. The police immediately took the children into protective custody.

V.H. admitted the children were alone, the burners were on,

and the house was in disarray. She also admitted (1) garbage, trash, dirty clothes, and animal and human waste were scattered throughout the house; (2) a putrid odor permeated the entire residence; (3) J.H. and H.H. had been observed at school on numerous occasions in very dirty clothing and in dire need of bathing; (4) school personnel bathed and gave new clothes to J.H. and H.H.; and (5) V.H. had been informed of the hygiene problems by school personnel, but had not cooperated in correcting the problem. V.H. stated she had left the children alone for about 20 minutes while she went to the store for food. She explained the condition of the house as being partially the result of the gas and water being turned off for not paying the utility bill and partially the result of plans to move at the end of the month.

Photographs were introduced to show the condition of the house on the date the children were taken into protective custody. The pictures showed clothes piled throughout the residence; the bathroom stool unflushed; dishes left unwashed in the kitchen sink; little food in the refrigerator, which needed to be cleaned; and liquor bottles, some of which appeared to contain alcohol, prevalent in the residence.

According to V.H., she was receiving $560 per month in aid to dependent children payments. She paid $250 per month rent for the Laurel Avenue residence. Also, V.H. owed $30 to the Omaha Public Power District and $400 to the Metropolitan Utilities District for unpaid utility bills and $225 to friends and relatives for various loans. By the time of the dispositional hearing, two warrants had been issued for V.H.'s arrest due to nonpayment of fines. V.H. owed $180 on a $220 fine for one count of child abuse/neglect (stemming from the March 21 incident) and another $40 fine on a ticket for improper turning.

V.H. had been previously convicted of child abuse/neglect in 1982. The charge resulted in the five oldest children being placed under the jurisdiction of the juvenile court from July 27, 1982, until November 6, 1984. The previous involvement of the juvenile court was terminated after the court found further intervention would be to no avail and would be unnecessary.

At the final hearing, extensive evidence was introduced concerning V.H.'s compliance with the court-ordered

rehabilitation plan and the effect the proceedings were having on the children. The court also took judicial notice of all reports introduced at the review hearings.

In the approximately 2 1/2 years in which the children were under the jurisdiction of the juvenile court, V.H. held roughly 10 jobs, some for only 2 weeks. Within this time, she had also been unemployed for several months. She was terminated at two jobs because of her attendance record, and she lost another job because of a complaint about alleged contact with a customer. She voluntarily left other jobs for various reasons. When she was employed, she frequently did not provide income verification as required by the court.

In the same time period, V.H. reported approximately 15 different residences. V.H. did not timely inform the probation officer of all the changes in residences. In most of these residences, she was living in the homes of friends or relatives or in shelters. Only two of the reported residences were independent, one of which she obtained in December of 1987, after the motion to terminate parental rights was filed. For about 6 months, she received room and board in exchange for caring for an elderly gentleman. The probation officer inspected the situation and classified it as inadequate. There was also a 6 1/2-month period between October 1986 and May 1987 when there was no contact with V.H., and she did not report her whereabouts. Further, in the entire 2 1/2-year period, V.H. supplied only two rent receipts, showing payment of $130 toward rent of $250.

V.H.'s visitation with her children deteriorated over the 2 1/2 years of court supervision. According to Lillie Carther, the DSS caseworker in charge of the children while they were under the court's jurisdiction, V.H. made 33 of 36 possible visits in 1985, 40 of 48 possible visits in 1986, 18 of 48 possible visits in 1987, and 8 of 15 possible visits through April of 1988. V.H. explained the decreased visitation was due to a change in DSS rules concerning the timing of arranging visits. She stated she was not always able to get to a phone before the deadline. Carther testified she tried to accommodate V.H. even if she called in late.

At the beginning, an observer described the visits as

containing "a great deal of yelling, fighting, [and] throwing things (toys)." Visits attended by V.H.'s mother were "calmer" than when V.H. was there alone. The CPS observer described the children as "wild and out of control." The worker also described V.H. as "oblivious" to the conduct of the children. Later observations indicate V.H. was unable to maintain control of the children during visits. Observers described the children as "animals" during the visits, saying, "They climb all over everyone else and hit each other, [and] run wild in the halls." J.H., H.H., and L.H. would enter offices in the building where the visitations occurred and steal items out of desks. On several occasions, M.H. returned to the foster home with bruises and scratches. These problems appear to have been corrected when the visits were split.

V.H. was occasionally late for the scheduled visits. She excused the tardiness and failure to keep appointments as due to lack of transportation, although DSS provided bus tickets and cabfare to assist in getting to appointments.

The record shows V.H. virtually vanished between December 1986 and May 1987. V.H. did not visit any of the children between December 4, 1986, and May 14, 1987. She had no contact with H.H. from October 30, 1986, until May 1987. Further, she contacted her probation officer only once and did not attend the relinquishment counseling during the October to May period. She did not maintain steady housing or employment and did not report changes in housing and employment during this time period. V.H. explained the lack of contact was due to depression over not having a job or her own housing; also, she stated she had been sick with bronchitis and a slight case of pneumonia.

The evidence overwhelmingly shows this absence caused the children to wonder if something was wrong with V.H. and even to fear she might have died. During the absence, however, the behavior of the children improved, only to deteriorate again once V.H. returned.

V.H. underwent chemical dependency testing. Although V.H. was not chemically dependent, the counselor recommended participation in an alcohol education program designed to increase awareness of the warning signs of alcohol

abuse. V.H. completed the program on October 21, 1986.

The ordered psychological and psychiatric evaluations were conducted in April 1986. Ravinder P. Mediratta, M.D., of the Creighton University department of psychiatry, determined V.H. did not suffer from any mental illness, psychotic disorder, organic brain disorder, or personality disorder which would interfere with her ability to take care of the children. Thomas A. Korn, Ph.D., from St. Joseph Center for Mental Health, conducted the psychological evaluation. According to Korn, V.H.'s "ability to model an adequate social behavior and her judgment in parenting and child care issues is [sic] highly questionable."

Further, V.H. made less than 75 percent of her monthly meetings with the probation officer. The record also indicated V.H. attended only one session of relinquishment counseling after it was ordered on May 6, 1986.

At various points during the court's supervision, J.H., H.H., L.H., and M.H. underwent evaluation and counseling, necessitated by behavior problems. These problems included fighting at school and in the foster home, running away from the foster home, stealing, and sexual conduct inappropriate for their age groups. J.H., L.H., and H.H. all received inpatient evaluations at St. Joseph Center for Mental Health. The foster placements of several of the children had to be changed as a result of their behavior problems.

Gwen Opfer, the DSS worker in charge of L.H.'s foster care between October 1986 and June 1987, testified she had no contact at all with V.H. during the time she was in charge of L.H. and could not reach V.H. to arrange visits. L.H.'s foster mother told Opfer there was some visitation in November, but, otherwise, there were no cards, letters, gifts, or phone calls from V.H. during that time. Because of V.H.'s absence, L.H. expressed the fear that V.H. was dead. In June 1987, L.H. moved to Lincoln to live with his grandmother. David Hammer became the worker in charge of L.H.'s case. Hammer testified, in the time L.H. had been in Lincoln, V.H. had never contacted Hammer to arrange visits. The grandmother told him V.H. visited on approximately four occasions and called less frequently. In Hammer's opinion, the extended periods of time

during which there was no contact between L.H. and his mother was not in the child's best interests and caused L.H. concern. Also, Hammer stated the placement with the grandmother had been good for L.H., and L.H. wished to stay with the grandmother.

Kendal Osbahr, director of the Blondo Treatment Facility, where H.H. was placed from September 5, 1986, until November 24, 1987, testified as to V.H.'s relationship with H.H. During the time H.H. was in the facility, V.H. was ordered to participate in H.H.'s therapy and in parenting classes at the facility. Visitations were scheduled either immediately before or after the therapy sessions. Of a possible 55 sessions, V.H. attended only 11. In Osbahr's opinion, V.H.'s attendance at the parenting classes was too infrequent to make progress in dealing with H.H.'s behavior problems. During his stay at the facility, H.H. expressed concern over V.H.'s not visiting, especially during her absence between October 1986 and May 1987. Osbahr stated it was her opinion that the inconsistency of V.H.'s visits was not in H.H.'s best interests.

In the opinion of Carther, the children's behavior problems during visitations were caused by instability brought about by the presence of V.H., and it would be in the best interests of all the children for V.H.'s parental rights to be terminated. From the beginning, the consensus of the social workers involved in the case recommended termination of V.H.'s parental rights.

V.H. makes five assignments of error, which will be dealt with in order.

V.H. first claims the juvenile court erred in finding there was sufficient evidence to support the termination of her parental rights. The second assignment of error claims the court did not determine it was in the best interests of the children for V.H.'s rights to be terminated. These two arguments overlap and will be discussed together.

A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply with a rehabilitative plan ordered by the juvenile court, and it is in the best interests of the children that parental rights be terminated. *In re Interest of E.B.*, 232 Neb. 653, 441 N.W.2d 637 (1989); *In*

re Interest of S.C., S.J., and B.C., 232 Neb. 80, 439 N.W.2d 500 (1989).

A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child presents an independent reason justifying termination of parental rights. *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989); *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

The record supports the juvenile court's determination that V.H. failed to comply with the rehabilitation plan. She received repeated warnings from the court and the probation officer that there was a strong possibility her parental rights would be terminated if she did not at least make a reasonable attempt to comply with the plan. V.H. testified that financial problems were the cause of failure to comply, but the evidence also shows that she lost jobs because she did not show up for work and that she quit jobs because she was not being paid what she considered enough money. Also, at the hearing of May 18, 1987, V.H. stated she did not want a job that was only going to pay "three something an hour." She also acknowledged at that hearing that she had made no effort during the previous 6 months to contact the caseworker or probation officer and that if one of her children had become gravely ill during that period, no one would have known how to find her. On this record, we find there was more than sufficient evidence to find V.H. failed to comply with the court-ordered plan.

The juveniles' best interests are the primary considerations in considering whether parental rights should be terminated. *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). Where a parent is unable or unwilling to rehabilitate herself within a reasonable time, the best interests of the children require termination of the parental rights. *In re Interest of P.D., supra.*

The record is clear that the disruption in the lives of the children was enormous. Between 1982 and 1988, the children had been under the jurisdiction of the court for all but approximately 6 months. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain

parental maturity. *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989); *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 430 N.W.2d 552 (1988).

Further, the testimony of the caseworkers involved with the children shows the children fared better during the 6-month period in which they had no contact with V.H. There is sufficient evidence that termination of V.H.'s parental rights is in the best interests of the children.

The third assignment of error claims the rehabilitation plan was not reasonable in that it did not adequately provide for the correction of the problems which led to the filing of the original petition.

A juvenile court has discretionary power to prescribe a reasonable plan for parental rehabilitation to correct conditions underlying the adjudication that a child is a juvenile within the juvenile code. *In re Interest of L.H., supra.*

V.H.'s main argument claims a one-bedroom apartment, which the plan required her to obtain, was, by definition, insufficient for herself and her five children. While it is obvious six people in a one-bedroom residence would indeed be crowded, it should be noted the court established that as a *minimum*; V.H. was free to obtain more spacious living quarters. At the termination hearing, the probation officer addressed this issue, stating, "The reason for the one bedroom was to get [V.H.] on her feet so that we could start moving the children home . . . ." She further testified, "We were willing to work with the mother for her to start with a one bedroom and work into a larger residence that would accommodate all five children . . . ." The one-bedroom specification appears to have been an acknowledgment that, at the time of the first hearing, V.H. may not have had the financial resources to obtain a larger, presumably more expensive, residence. The major focus was on having V.H. maintain a steady residence that was properly furnished and kept in order.

At the time the court took jurisdiction over the children, a large part of the problem was the conditions in which the children were living. The housing requirement was intended to rectify this shortcoming. The plan never developed further

because of V.H.'s own actions.

The employment requirement was needed to assist V.H. in maintaining adequate housing. The other requirements were aimed at assisting V.H. in reaching the goal of reunification of the family. As such, the plan adopted by the court appears to have been a reasonable attempt to correct the conditions which led to the original adjudication. Therefore, the court did not abuse its discretion in the formulation of the plan.

V.H. also relies on the psychiatric and psychological evaluations, which recommend reunification of V.H. and her children with long-term supervision by DSS. According to V.H.'s brief, since these recommendations were not followed, the plan was not reasonable.

It should be noted these evaluations did not make an unqualified recommendation for reunification. Dr. Korn's evaluation stated:

> *If* in the wisdom of the court, the . . . children are reunited with their mother in the home environment, it would appear that a lengthy (one year) trial period during which continuous weekly monitoring and concurrent remediation of [V.H.'s] parenting and child care practices be carried out in order to insure the health and well-being and adequate social functioning of the children.

(Emphasis supplied.) Dr. Mediratta stated: "She *may* be given partial responsibility to take care of her children . . . under very close Welfare supervision, maybe starting with one or two children." (Emphasis supplied.)

V.H.'s argument ignores the fact that at no time during the court's involvement was there any type of residence in which to reunite the family. Reunification of the family, under the conditions which existed, would in all likelihood have led to a continuation of the problems which the family was experiencing in March 1985. The court did not err by not acting upon the recommendations found in these evaluations.

V.H. also claims there was not sufficient evidence that her noncompliance was willful. The record shows, during the 2½ years preceding the filing of the motion to terminate her parental rights, V.H. was unable or unwilling to maintain steady employment and independent housing. She did not even

maintain one residence for any length of time. She was evicted for nonpayment of rent from the only independent housing she had during this time. V.H. had the probation officer visit at least one prospective residence, but never moved into it even though it was adequate. At one point in time, V.H. had $550 in savings but did not obtain the required housing. It appears she used at least part of the money to purchase an automobile which was not in good condition. Upon this record, we cannot say the failure to comply with the plan was not willful.

Fourth, V.H. claims the court erred in not granting her visitation with her children pending the appeal to this court. "After parental rights have been terminated, visitation while an appeal is pending would not be in the best interests of children who already have been in limbo for months or years." *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 243, 430 N.W.2d 552, 556 (1988). Clearly, the court did not err in refusing to grant V.H. visitation during this appeal.

Lastly, she claims the termination hearing did not comply with the requirements of due process because (1) there was a substantial delay between the filing of the motion for termination and when the actual hearing was held, and (2) the court did not allow evidence to be presented as to V.H.'s compliance in the time between the filing of the motion and the actual hearing.

The only reference in the record to the length of time between the filing of the motion in September 1987 and the hearing in February 1988 indicates the delay was in part due to continuations requested by V.H. Appellant has not provided a record upon which we may properly evaluate this argument. Therefore, we find there was no prejudice caused by the delay.

V.H. also claims she was denied due process because certain evidence concerning compliance with the court order since the filing of the motion in September 1987 was not admitted. A review of the evidence introduced at the hearing on the motion to terminate shows, however, that evidence was admitted as to V.H.'s compliance with the rehabilitation plan since the time the motion was filed. Evidence was received concerning V.H.'s employment, housing, visitation with her children, and meeting with the probation officer.

The only evidence to which an objection was sustained because of the timeframe involved was certain testimony of the foster mother of M.H., who was also a friend of V.H. This testimony concerned V.H.'s church attendance, a matter which the court found irrelevant. The court sustained an objection to certain testimony regarding contact between the foster mother and V.H., apparently because the timeframe was not specified. No offer of proof was made, nor is the substance of the evidence apparent from the context in which it was offered. "Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." Neb. Rev. Stat. § 27-103(1) (Reissue 1985); *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985). On the record before this court, we fail to see how any substantial right was affected by the exclusion of the above evidence.

The due process assignment of error is without merit.

The judgment of the separate juvenile court of Douglas County terminating V.H.'s parental rights over J.H., H.H., L.H., M.H., and R.H. is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. IPALIBO GEORGE WOKOMA, APPELLANT.

445 N.W.2d 608

Filed September 15, 1989. No. 88-767.

Convictions: Appeal and Error. In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Joseph D. Nigro for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

On May 20, 1988, in the district court for Lancaster County, defendant-appellant, Ipalibo George Wokoma, was convicted by a jury of sexual assault in the first degree under Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1985). Under that statute, any person who subjects another person to sexual penetration, and the actor is 19 years of age or older and the victim is less than 16 years of age, is guilty of a Class II felony. Defendant was sentenced to imprisonment of not less than 4 nor more than 10 years.

Defendant timely appealed to this court, assigning as error only the district court's action in finding there was sufficient evidence to support the jury's verdict. We affirm.

The record shows the following. Defendant was sexually involved with the victim's mother and lived with the victim and her mother at various locations in Lincoln, Nebraska, from July 1984 to August 1985. Defendant married another woman on March 13, 1986, but continued to visit the victim's mother at her residence on several occasions thereafter, and in particular on two occasions during April 1987, when defendant was 24 years old and the victim was 13. The victim testified that during the time when the defendant lived in the same household with the victim and her mother there were many sexual assaults on the victim by defendant but that the incidents were indistinguishable in her memory. The assaults involved both penile and digital penetration, which caused the victim pain and caused her to bleed from her vagina.

The victim testified specifically to two sexual assaults on her by defendant in April 1987. On the first occasion, the defendant

came over to visit the victim's mother at about 1 a.m. After the defendant arrived, he went with the victim's mother into the victim's mother's bedroom. The victim was sleeping on the couch in the living room, which was a short distance from the mother's bedroom. After a short time the phone rang. While her mother was talking on the phone in the bedroom, the defendant came into the living room, began touching the victim, and digitally penetrated the victim. When the defendant heard sounds from the bedroom indicating the victim's mother was getting up from the bed, the defendant ceased and ran into the bathroom. Later that morning, the mother escorted the defendant out of the house.

On the second occasion in April 1987, the defendant again came to the victim's residence at about 1 a.m. The victim's mother was expecting the defendant and had asked the victim to hide the mother's purse. The defendant appeared to be drunk and went with the victim's mother into the mother's bedroom. After a time, the defendant came into the living room, where the victim was resting, and penetrated the victim both digitally and with his penis. Afterward, the defendant returned to the mother's room.

The victim testified that she did not complain of the assaults until after this second assault in April 1987. The victim testified that she was afraid to reveal the assaults to her mother, who frequently beat and whipped her. She also stated that the defendant told her she would be beaten if she told.

The day after the second April 1987 assault, the victim was upset and told her friend at school that the defendant had assaulted her. The friend wanted to call the victim's mother, but the victim did not want her to because she was afraid she would be punished.

On approximately April 24, 1987, the victim was removed from her mother's care because of physical abuse and placed with a foster family. The victim's foster mother immediately noticed a strange odor emanating from the victim. The foster mother at first thought the odor was caused by the victim's shoes or clothes or that the victim was not washing herself well enough. Finally, on a family trip in late May 1987, the foster parents determined that the odor was so bad that they should

discuss it with the victim. The foster mother had a discussion with the victim and discovered that the odor came from the victim's vagina. At this time, the victim also revealed to her foster mother the assaults by the defendant.

Consequently, in early June 1987, the victim was taken to a physician. The victim was diagnosed as having trichomonas infection, a sexually transmitted disease. The victim first noticed the discharge associated with the disease as early as October 1984. The victim was given an antibiotic to treat the infection.

The defendant testified and denied the assaults. There is no evidence that either the defendant, his wife, or the victim's mother has ever been diagnosed as having trichomonas infection. However, the defendant indicated on a medical history taken December 30, 1986, that he had problems with a discharge from his penis and a burning sensation during urination. He also complained of a discharge from his penis during a May 1, 1987, doctor's examination. During the May 1 examination, the defendant tested negatively for chlamydia and gonorrhea, but defendant's physician testified such tests will not reveal the presence of trichomonas. As a result of his May 1987 examination, the defendant was treated with a broad-spectrum antibiotic.

The victim's physician testified that a male infected by trichomonas could experience either no symptoms, have a penis discharge, or have a burning sensation during urination. The victim's physician also testified that adult immune systems are often able to combat trichomonas infection but that children often require medication to be cured. The evidence relating to the infection, if believed by the jury, was consistent with both the defendant's and the victim's being infected with the disease.

Defendant contends that "[i]t becomes clear that the evidence is insufficient to support a verdict of guilty when inconsistencies in [the victim's] story are considered along with other facts in evidence which support the defendant's version rather than the version of [the victim]." Brief for appellant at 6.

In evaluating that contention, this court's standard of review is that a judgment of conviction will not be reversed on appeal

unless the evidence supporting the conviction is so lacking in probative force that it is insufficient as a matter of law. *State v. George*, 228 Neb. 774, 424 N.W.2d 350 (1988); *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988). The State is not required to disprove every hypothesis but that of guilt. *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988).

Applying those rules, the evidence as shown in the record, if believed by the jury, is clearly sufficient to support the verdict of guilt. As required at the time of defendant's conviction, the victim's testimony as to the crime was fully corroborated by the testimony of the victim's school friend, by the testimony of the victim's foster mother, and by the circumstances of the presence of a sexually transmitted disease in the body of the victim. The judgment of conviction is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL THOMAS MEIS, APPELLANT.
445 N.W.2d 610

Filed September 15, 1989. No. 88-808.

1. **Postconviction: Proof: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

3. **Postconviction: Effectiveness of Counsel: Proof.** When, in a postconviction motion, a defendant alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions.
4. **Postconviction.** An evidentiary hearing in a postconviction proceeding may be denied when the records and files in the case affirmatively establish that the defendant is not entitled to relief.
5. _____. In a proceeding under the Postconviction Act, the applicant is required to allege facts which, if proved, constitute a violation or infringement of rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing.
6. **Supreme Court: Judicial Notice.** The Supreme Court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have been previously considered and determined, in cases which are interwoven and interdependent.
7. **Expert Witnesses: Effectiveness of Counsel: Proof.** Generally, expert testimony is not admissible as proof that assistance of counsel in a criminal case was ineffective.

Appeal from the District Court for Antelope County: MERRITT C. WARREN, Judge. Affirmed.

Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

The defendant, Daniel Thomas Meis, has appealed from the order of the district court which denied him a hearing on and overruled his second motion for postconviction relief. The proceedings regarding his first motion are found in *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986). His direct appeal, which contains most of the facts concerning his conviction for first degree murder, may be found in *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984). We affirm the order of the trial court.

A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous. *State v. Patterson*, 232 Neb. 304, 440 N.W.2d 242 (1989); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

In his first motion for postconviction relief, the defendant alleged that he was denied effective assistance of counsel at trial and on appeal and that the prosecutor conducted himself in such a way as to result in prosecutorial misconduct. The district court allegedly refused to hear evidence on the defendant's numerous other claims because they could have been raised on direct appeal.

After an evidentiary hearing, the district court denied the defendant's request for postconviction relief. On appeal, this court affirmed, finding that the claims on which the district court allegedly did not permit evidence all could have been, and some were, raised on direct appeal, including the trial court's failure to make an entry on the record as to the voluntariness of the defendant's impeaching statement. Additionally, the issue of prosecutorial misconduct could also have been raised on appeal. This court further found that there was no factual support for the allegations of ineffective assistance of counsel at trial and on appeal, including the allegation relating to trial counsel's failure to object to statements made by the prosecutor in closing argument and failure to fully cross-examine witnesses.

Regarding trial counsel's alleged ineffectiveness in not objecting to statements in the prosecutor's closing argument, trial counsel testified at the postconviction hearing that he had discussed with cocounsel and the defendant whether to object and decided against objecting. In light of that testimony, this court found the failure to object to be a matter of trial strategy. As to the claim that trial counsel failed to fully cross-examine witnesses, this court held that the defendant failed to allege facts to show how he suffered prejudice and also failed to prove prejudice.

In his second motion for postconviction relief, the defendant alleged that he was denied effective assistance of counsel in that his postconviction counsel (1) failed to make a record and offer

proof that his trial counsel did not hear portions of the prosecutor's closing argument and therefore did not object that the argument was contrary to the evidence; (2) failed to adequately argue the trial court's failure to make a finding with respect to the voluntariness of certain of the defendant's statements and the admissibility of those statements for impeachment purposes after suppressing the statements; (3) failed to raise all reasonable bases for relief, including (a) trial counsel's failure to discuss with defendant all available defenses and lesser-included offenses, and (b) trial counsel's failure to properly prepare for and cross-examine one of the State's expert witnesses; and (4) failed to object to expert testimony on the issue of whether the defendant received effective assistance of counsel.

According to the defendant, with respect to the foregoing allegations of errors and omissions on the part of his postconviction counsel, he was prejudiced in that (1) the conduct of counsel was less than that which a lawyer with ordinary training and skill would have provided the defendant; (2) but for the unreasonableness of counsel's effort, there existed a reasonable probability that the outcome of the proceeding would have been different sufficient to undermine confidence in the decision; and (3) the evidence or arguments, if properly developed by counsel at the postconviction proceeding and at the original trial, would have raised a reasonable doubt and would have resulted in the acquittal of the defendant on all charges.

After hearing arguments from both sides via a telephone conference call, the district court denied the defendant an evidentiary hearing on his second motion for postconviction relief, making the following pertinent findings: (1) The trial jury was instructed to not be influenced by arguments of counsel not supported by the record, the record of the first postconviction proceeding reflects that trial counsel made a tactical and strategic decision not to object to the prosecutor's closing argument, and the argument made by the prosecutor related to evidence that was an insignificant matter in the context of all evidence presented at trial; (2) the trial court's admission of the defendant's statements for impeachment

purposes constituted an independent determination of the court that the statements were voluntary, and defendant failed to allege that his statements were not voluntary or how he was or could have been prejudiced by the admission of the statements; (3) trial counsel's argument to the jury constituted performance at least as well as would have been made by a lawyer of ordinary training and skill in criminal law in the area, was a matter of trial strategy, and adequately covered the subject of manslaughter given that the jury may have considered a request for a manslaughter conviction as inconsistent with the defendant's claim of innocence; (4) the defendant's allegation of ineffective assistance of counsel due to the manner in which trial counsel cross-examined one of the State's expert witnesses has previously been addressed and dismissed by this court; and (5) there is no reasonable probability that the result of defendant's first postconviction proceeding would have been different if counsel had objected to the expert testimony relating to the effective assistance of counsel.

Defendant assigns as error that the district court erred (1) in failing to allow the defendant an evidentiary hearing, (2) in holding that effective assistance of counsel is governed by a "locality rule," (3) in determining that the defendant was represented by competent counsel at his trial and in his earlier postconviction proceeding, and (4) in holding that expert testimony was admissible to determine whether the defendant received effective assistance of counsel.

The defendant is entitled to bring this second proceeding for postconviction relief because the grounds relied upon, ineffective assistance of postconviction counsel, did not exist at the time of the filing of the first motion for postconviction relief. See, *State v. Nance*, 227 Neb. 581, 418 N.W.2d 598 (1988); *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983). However, such a motion cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. See *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989).

STANDARD FOR DETERMINING EFFECTIVE ASSISTANCE OF COUNSEL

The defendant argues initially that the standard for

ineffective assistance of counsel established by this court is in conflict with the standard established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because of the "locality rule" added to the Nebraska standard.

As most recently articulated by this court in *State v. Patterson*, 232 Neb. 304, 308, 440 N.W.2d 242, 245 (1989), the standard to be applied is as follows:

> When, in a postconviction motion, a defendant alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions.

According to the defendant, the Court in *Strickland, supra*, did not *suggest that the effective assistance of counsel is to be measured by the relative competence of a small group of lawyers* in a particular region of the country. However, the Court did hold that "*[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard* of reasonableness." (Emphasis supplied.) 466 U.S. at 687-88.

This court decided prior to *Strickland* that ineffective assistance of counsel would be measured by the *performance of "a lawyer with ordinary training and skill in the criminal law in his area.*" (Emphasis supplied.) See *State v. Leadinghorse*, 192 Neb. 485, 489, 222 N.W.2d 573, 577 (1974). Contrary to the defendant's contentions, the Nebraska standard is not in conflict with the *Strickland* standard. In Nebraska, the objective standard of reasonableness to be used is the performance of a lawyer with ordinary training and skill in the criminal law in the area.

In further support of his contention, the defendant cites *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981), in which the

court rejected a locality rule in sixth amendment cases. A careful reading of the opinion, however, *reveals that a locality rule is not invalid, it simply is not accepted in federal courts.* In *Hawkman* the court explained:

> Appellant state of Nebraska argues that the federal district court ordered an evidentiary hearing in this case to determine whether the performance of Hawkman's counsel was "at least as well as a lawyer with ordinary training and skill in the criminal law in his area," namely, the area of Valentine, Nebraska. In ordering the hearing, the district court stated, *inter alia*, "[s]ince in this case evidence regarding the standard of performance for an attorney was not developed at the state hearing, an evidentiary hearing is, therefore, appropriate." It appears to us that the district court convened the hearing simply to elicit opinions as to what actions a reasonably competent attorney would have taken on Hawkman's behalf. . . . It is true that all witnesses who testified at the federal hearing were from western Nebraska and specifically from Valentine or Scottsbluff. However, the federal district court: (1) correctly set forth the applicable constitutional standards of counsel competence in this circuit; (2) expressly stated in its opinion that an evidentiary hearing was held "concerning the standard of performance for an attorney with ordinary training and skill"; and (3) clearly did not apply the Nebraska standards of counsel effectiveness set forth in *State v. Leadinghorse, supra*, 222 N.W.2d at 577. If the *Leadinghorse* standards differed from the federal standards delineated in our opinions, they would, of course, not bind a federal district court.

661 F.2d at 1165-66.

The defendant's contention that the effectiveness of counsel cannot be measured by comparison with the performance of a lawyer of ordinary training and skill in the criminal law in the area is without merit.

DENIAL OF AN EVIDENTIARY HEARING

The defendant argues that he was entitled to an evidentiary hearing on his motion for postconviction relief. An evidentiary hearing may be denied on a motion for postconviction relief

when the records and files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989). In a proceeding under the Postconviction Act, the applicant is required to allege facts which, if proved, constitute a violation or infringement of rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing. *Id.*

THE PROSECUTOR'S CLOSING ARGUMENT

The defendant argues that his contention that his counsel made no objection because counsel did not hear the argument is different from the issues he raised about the prosecutor's closing argument in his first postconviction proceeding. According to the defendant, an evidentiary hearing is necessary to determine whether counsel heard the statements and decided as a matter of strategy not to object or whether counsel simply did not hear the argument.

The defendant's claim is without merit. In affirming the denial of postconviction relief the first time, this court considered the defendant's contention that he received ineffective assistance of counsel at trial and on appeal because his counsel failed to object to statements of the prosecutor in closing argument. Noting that the defendant's counsel testified at the postconviction hearing that he discussed whether to object with cocounsel and the defendant, this court found the failure to object to have been a matter of counsel's trial strategy. Implicit in trial counsel's testimony that he considered and discussed whether to object to the prosecutor's comments is the fact that trial counsel did hear the comments.

ADMISSION OF SUPPRESSED STATEMENTS FOR IMPEACHMENT

The defendant's challenge of the admissibility of suppressed statements for purposes of impeachment has already been addressed by this court. On direct appeal, this court upheld the use of the statement for impeachment purposes, noting that the defendant made no claim that the statement was involuntary. In his first motion for postconviction relief, the defendant's contention that the trial court erred in failing to make an entry on the record as to the voluntariness of the defendant's

impeaching statement was summarily dismissed because the claim had been raised on appeal. In this motion for postconviction relief, the defendant contends that postconviction counsel was ineffective in failing

> to adequately argue and/or develop an argument on the record concerning the Trial Court's failure to make a finding with respect to the voluntariness of certain of the defendant's statements, and the admissability [sic] of those statements for impeachment purposes following an Order of the Court suppressing those statements.

The defendant is, quite simply, beating a dead horse. This is the third time the issue of the voluntariness of the suppressed statement has been raised by the defendant and the third time he has failed to allege that the statement was in fact involuntary.

OTHER CLAIMS FOR RELIEF

The defendant argues that postconviction counsel failed to raise two issues which, according to the defendant, were apparent on the record and should have been raised if counsel was conscientiously representing the defendant's interests.

The first issue has to do with whether trial counsel discussed with the defendant all available defenses to the charge, including the possibility of arguing for conviction of a lesser-included offense. The defendant contends post-conviction counsel was ineffective in not arguing that trial counsel was ineffective because of the "all or nothing defense" that the defendant was not guilty by reason of accident.

During closing argument, the defendant's trial counsel stated:

> I think that the State has failed to meet its burden of proof that murder in the first degree was committed. It's failed to meet its burden of proof that murder in the second degree was committed. It's failed to meet its burden of proof that manslaughter was committed. And it's failed to meet its burden of proof that it wasn't an accident. And that burden of proof is beyond a reasonable doubt.
>
> One final thing I'd like to touch on is the unlawful act in the manslaughter. You are going to be asked to look at that. I think the Judge may instruct you on the offense of

> assault. When you look at that offense, you have to look at the offense, if any was committed, at the time of the shooting.
>
> . . . .
>
> . . . It is a tragedy when a young man loses his life. But the decision you have to make is whether the State has met its burden of proof in murder I, murder II, manslaughter, and that this was not an accident. I think when you examine the evidence that you have before you, you are going to find that the State has not met its burden of proof beyond a reasonable doubt, and it will justify a verdict of not guilty.

According to defendant's present appellate counsel, the defense of "accident" would not even be a defense under the facts of this case. He argues that having a gun unintentionally discharge "while struggling with the victim would be an unintentional killing while in the commission of an unlawful act, to-wit: assault, unlawful discharge of a firearm, etc." Brief for appellant at 27. Accordingly, counsel continues, the offense would be manslaughter pursuant to Neb. Rev. Stat. § 28-305 (Reissue 1985). He also argues that defense trial counsel should have requested an instruction on and argued self-defense.

We deal first with the matter of self-defense. In order to maintain some consistency with the defendant's own testimony and to avoid detracting from its credibility, trial counsel could hardly have argued self-defense. This was entirely inappropriate given the fact that defendant insisted throughout all of his testimony that he did not intend to kill the victim; i.e., he did not intend to and did not in fact use any force against the victim, Thomas Schuchardt. The defense of justification states that "the use of force upon or toward another person is justifiable when the actor [defendant] believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." Neb. Rev. Stat. § 28-1409 (Reissue 1985).

When asked on cross-examination whether he, the defendant, had said, "I had to blow him away," the defendant responded, "I remember us talking about the shells and that I didn't mean to blow him—shoot him, something like that, but

it wasn't that I had to do anything." Further on, defendant testified, "I don't remember exactly what I said, but it had [sic] to the effect I wouldn't do it just because I couldn't breathe."

Under the circumstances, trial counsel would not have been justified in arguing self-defense.

Defendant's present argument that having a gun unintentionally discharge while in the commission of an unlawful act such as an assault or unlawful discharge of a firearm would also find no support in the posture of the case in which trial counsel was left following his client's testimony. Defendant denied that he in any manner assaulted the victim. He denied that he intentionally fired the weapon. His statement that the gun accidentally discharged, without more, would not amount to a criminal act.

Finally, appellate counsel criticizes trial counsel for arguing accident as a defense. However, to understand the argument that was made at trial, it is necessary to examine the court's instructions.

The court correctly set forth the elements which the State must prove in order to establish first degree murder, second degree murder, or manslaughter, i.e., that defendant killed the victim purposely and with deliberate and premeditated malice; that he killed the victim intentionally, but without premeditation; or that he killed him without malice, either upon a sudden quarrel or unintentionally while the defendant was in the commission of an unlawful act. There was no evidence that this occurred upon a sudden quarrel; whatever fighting had been going on had covered a period consisting of most of the evening, and defendant denied that he had any quarrel with the victim at the time of the killing. That would leave only the second prong of manslaughter, unintentional killing while in the commission of an unlawful act. It was obvious that the only unlawful act during which the killing occurred would have to have been an assault, and the court defined the various degrees of assault. However, as previously stated, defendant's testimony completely negatived an assault on his part.

As defined in the instructions, it was necessary to prove an intentional act on the part of the defendant, whether it be the actual killing to support first or second degree murder, or an

unlawful assault to support the charge of manslaughter.

By instruction No. 10, the trial court instructed the jury:

> Regarding Count I, the defendant contends that he shot and killed Thomas A. Schuchardt accidentally, and he thus denies that the killing was done purposely and with deliberate and premeditated malice; he thus denies that he intentionally killed Thomas A. Schuchardt; and he denies that he killed Thomas A. Schuchardt either upon a sudden quarrel, or unintentionally while he was in the commission of an unlawful act.
>
> The claiming of such a defense does not shift to the defendant the burden of proving that the homicide occurred by accident.
>
> As explained in Instruction No. 4, the burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged or included therein, and that burden never shifts.

Trial counsel perhaps was incorrect, semantically speaking, in stating that the burden was on the State to prove that the killing was not accidental. However, what his argument amounted to was that in order to convict, the State had the burden of proving all of the elements of the charged crime or one of the lesser-included offenses, and in order to do so it would in effect be proving that the shooting was not an accident. Perhaps the State could have objected to his characterization of the burden of proof, but it did not, and certainly such an argument favored the defense.

In denying defendant an evidentiary hearing, the district court found that

> trial counsel's argument to the jury constituted performance at least as well as would have been made by a lawyer with ordinary training and skill in criminal law in the area, was a matter of trial strategy, and that trial counsel adequately covered the subject of a manslaughter conviction in view of the risk that asking for a manslaughter conviction could have been considered by the jury as inconsistent with the defendant's testimony claiming innocence.

This finding is not clearly erroneous and therefore cannot be

disturbed on appeal.

The second issue postconviction counsel allegedly failed to raise to establish that trial counsel was ineffective relates to trial counsel's handling of scientific evidence at trial, specifically the results of the neutron activation test done to determine the presence of gunpowder. In the earlier postconviction appeal, this court addressed the issue of whether trial counsel was ineffective in failing to properly cross-examine the State's forensic expert and found that trial counsel was not ineffective. The defendant contends that the test conducted on the defendant has previously been considered but that previous inquiry did not address the question of the test conducted on the victim.

This court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have been previously considered and determined, in cases which are interwoven and interdependent. *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982). A review of the briefs submitted in the appeal from the denial of the defendant's first motion for postconviction relief reveals that the issue under consideration at that time was the validity of the neutron activation test conducted on the hands of the victim.

EXPERT TESTIMONY REGARDING EFFECTIVE ASSISTANCE OF COUNSEL

The defendant's last argument is that postconviction counsel was ineffective in not objecting to the offer of expert testimony by the State regarding the reasonableness of trial counsel's efforts. Generally, expert testimony is not admissible as proof that assistance of counsel in a criminal case was ineffective. *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989). Nevertheless, as the district court determined, there is no basis to conclude that it is reasonably probable that the result of the first postconviction proceeding would have been different had counsel objected to such testimony from Richard Krepela, the State's expert witness. This finding of the district court not being clearly erroneous, it cannot be disturbed on appeal.

The defendant is entitled to no postconviction relief, and the order and judgment of the district court are affirmed.

AFFIRMED.

IN RE INTEREST OF M.B. AND J.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. T.B., APPELLANT.

445 N.W.2d 618

Filed September 15, 1989. No. 88-923.

1. **Trial: Evidence: Appeal and Error.** One who makes no objection to the admission of evidence at trial may not complain on appeal of its admission.
2. **Appeal and Error: Words and Phrases.** "Plain error" exists when there is plainly evident from the record error not complained of at trial which prejudicially affects a litigant's substantial right and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Virginia G. Johnson for appellant.

James Elworth, Deputy Lancaster County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

T.B. appeals the order terminating her rights as the mother of M.B., a daughter born February 12, 1986, and J.B., a son born July 23, 1983. She assigns as "plain error" that the separate juvenile court allowed the proceedings "to continue based on testimony from a caseworker with a recognized and significant conflict of interest." We affirm.

The mother, who at the time of the adjudication hearings was herself a juvenile within the jurisdiction of the court below, did not appeal the determinations that her children were in such circumstances as to come within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), which gives the juvenile court jurisdiction over any juvenile

> who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent,

> guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile. . . .

It would thus be inappropriate to concern ourselves with the facts under which the juvenile court asserted jurisdiction over the children. See *In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989).

Moreover, in view of the nature of the claimed error, it would not serve any useful purpose to detail the evidence which on de novo review clearly and convincingly establishes grounds for terminating the mother's parental rights in and to her two children. See, *In re Interest of J.H. et al., ante* p. 338, 445 N.W.2d 599 (1989); *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989). We need only note that while the record demonstrates that the mother has such an emotional attachment to her children that she may be said to love them and that when with the children she interacts well with them, the record also demonstrates that this now 21-year-old mother is still too immature, undisciplined, and unwilling, or perhaps unable, to make the day-to-day sacrifices which the raising of children demands. Although she made sporadic efforts to comply with the court-ordered plan for helping her to become an adequate parent and to be reunited with her children, she made no substantial long-term progress and has not acquired the commitment and skills required, and thus remains one who neglects to give her children necessary parental care and protection. Neb. Rev. Stat. § 43-292 (Reissue 1988) provides that parental rights may be terminated when such action is in the best interests of the juvenile and it appears by the evidence that, among other things, the parent has "substantially and continuously or repeatedly neglected the juvenile and refused to

give the juvenile necessary parental care and protection," or, as to a child found to be one described in § 43-247(3)(a), "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

The gravamen of the mother's complaint is that much of the evidence came from a Department of Social Services caseworker who was assigned both to her and to her children's cases. Although she made no objection to the caseworker's testimony on this basis, the mother now argues that the caseworker had such a conflict of interest that the termination of her rights in and to her children cannot stand.

In apparent recognition of the rule that one who makes no objection to the admission of evidence at trial may not complain on appeal of its admission, *In re Interest of J.H. et al., supra, Cassio v. Creighton University, ante* p. 160, 446 N.W.2d 704 (1989), and *State v. Welsh,* 232 Neb. 219, 440 N.W.2d 225 (1989), the mother characterizes her assignment of error as "plain error." Such has been said to exist when there is plainly evident from the record error not complained of at trial which prejudicially affects a litigant's substantial right and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989).

One of the major difficulties with the mother's argument is that she cites no legal authority in support of her argument that the caseworker in question should not have been permitted to testify. Neb. Evid. R. 601, Neb. Rev. Stat. § 27-601 (Reissue 1985), provides that every person "is competent to be a witness except as otherwise provided in these rules." We are cited to no legal authority which provides a basis for a caseworker-client privilege or duty of confidentiality or loyalty such as that suggested by the mother. Indeed, it seems to us that because the juvenile court's efforts are directed toward reuniting parents with their children, there is merit in having the testimony of a caseworker who has worked with all parties to the familial relationship. It must be remembered that a caseworker is not an

advocate for one party or another. A caseworker's function is to testify truthfully as to her or his observations and to express such competent opinions as may be sought. It is for the judge to evaluate the testimony and adjudicate the case in accordance with all the evidence.

There being no merit to the mother's position, the judgment of the court below is affirmed.

AFFIRMED.

IN RE INTEREST OF K.D.B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. E.O.B., APPELLANT.

445 N.W.2d 620

Filed September 15, 1989. No. 88-989.

1. **Courts: Jurisdiction: Notice: Appeal and Error.** For the Supreme Court to obtain appellate jurisdiction, it is mandatory that a party timely file a notice of appeal and deposit a docket fee in the office of the clerk of the trial court.
2. **Affidavits: Appeal and Error.** In lieu of filing a docket fee, a party may proceed to appeal in forma pauperis. Neb. Rev. Stat. § 25-2301 (Cum. Supp. 1988). To proceed without prepayment of fees and costs or security, a party must file his or her affidavit setting forth the nature of the action and that he or she is unable to pay the costs or give security involved in an appeal. In addition, the party appealing must obtain the authorization of the trial court to proceed in forma pauperis.
3. **Affidavits.** To be effective, a poverty affidavit must show on its face, by the certificate of an authorized officer before whom it is taken, evidence that it was duly sworn to by the party making the affidavit.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Appeal dismissed.

Kathleen M. Schmidt, of Emery, Penke & Blazek, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Richard E. Rothrock for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

The natural father of K.D.B. has filed an appeal from an order of the separate juvenile court of Douglas County terminating his parental rights in his now 11-year-old daughter. We dismiss the appeal for lack of jurisdiction.

Except as hereinafter noted, for the Supreme Court to obtain appellate jurisdiction, it is mandatory that a party timely file a notice of appeal and deposit a docket fee in the office of the clerk of the trial court. See, Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1988); *American Legion Post No. 90 v. Nebraska Liquor Control Commission*, 199 Neb. 429, 259 N.W.2d 36 (1977).

Neb. Rev. Stat. § 25-2301 (Cum. Supp. 1988) provides that in lieu of filing a docket fee, a party may proceed to appeal in forma pauperis. To proceed without prepayment of fees and costs or security, a party must file with the clerk of the trial court his or her affidavit setting forth the nature of the action and that he or she is unable to pay the costs or give security involved in an appeal. In addition, the party appealing must obtain the authorization of the trial court to proceed in forma pauperis. An appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith.

In this instance, K.D.B.'s father did not obtain the Douglas County Separate Juvenile Court's authorization to proceed in forma pauperis, nor did he file a proper affidavit with the trial court. A document labeled "affidavit" and purportedly signed by K.D.B.'s father was filed with the trial court, but the document is defective. There is no showing that it was sworn to by K.D.B.'s father before some person who had authority to administer oaths.

To be effective, a poverty affidavit must show on its face, by the certificate of an authorized officer before whom it is taken, evidence that it was duly sworn to by the party making the affidavit. See, *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969); *Kennedy & Parsons Co. v. Schmidt*, 152 Neb. 637, 42 N.W.2d 191 (1950); *Bantley v. Finney*, 43 Neb. 794, 62 N.W. 213 (1895). See, also, Neb. Rev. Stat. § 25-1241 (Reissue 1985).

Since the docket fee was not paid nor the requirements to proceed in forma pauperis met, we must dismiss this appeal for

lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH N. RHODES, APPELLANT.
445 N.W.2d 622

Filed September 15, 1989. No. 88-1042.

1. **Pleas: Waiver.** A plea of guilty or nolo contendere coupled with a claim of innocence should not be accepted unless there is a factual basis for the plea, and until the court taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.
2. **Pleas.** In order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the right against self-incrimination, and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the court must establish that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she is charged.
3. **Sentences: Appeal and Error.** A sentence imposed within statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Sentences.** In imposing a sentence, a trial court should consider, among other things, the nature of the offense and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Barry Waid, Hall County Public Defender, and Gerard A. Piccolo for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Following a plea of no contest, defendant, Kenneth N. Rhodes, was found guilty of attempted first degree sexual assault and was sentenced to imprisonment for a period of 8 to 12 years, with credit for time served. The term prescribed by statute for this offense is 1 to 20 years, and therefore the minimum term may not exceed 6 2/3 years. Apparently for that reason, defendant's sentence was later reduced to a term of 6 2/3 to 12 years. He has appealed, assigning as error that the trial court should not have accepted his plea of no contest because it was not entered voluntarily, knowingly, and intelligently and that the sentence, even as modified, was excessive. We affirm.

In the early morning hours of December 10, 1987, the victim was robbed and sexually assaulted in her home. Rhodes, a former tenant of the victim, was one of two suspects.

During the course of the investigation, a pair of shoes was seized from the defendant. The shoes were sent to the FBI crime laboratory in Washington, D.C., where they were compared with a footprint found on a chair under the window through which access into the victim's home was gained. It was determined that the footprint from the defendant's shoe matched the footprint on the cushion of the chair.

Rhodes was charged with first degree sexual assault, second offense; robbery; burglary; and use of a weapon in the commission of a felony. A habitual criminal charge was subsequently added to the information.

Initially, Rhodes pled not guilty to the charges against him. Pursuant to a plea bargain, he later pled no contest to attempted first degree sexual assault and all other charges were dropped. The trial court accepted the plea, found him guilty, and imposed the sentence, which was later reduced to conform to the limits prescribed by statute.

During defendant's original arraignment, the penalties for the various crimes charged against him were stated by the court: 1 to 50 years, 1 to 20 years, 1 to 20 years, and 1 to 20 years. At the second arraignment, where defendant was again represented by counsel and when he tendered his plea of nolo contendere, the court explained to him that an amended information had been filed charging him with "criminal

attempt, first degree sexual assault," for which the penalty was imprisonment for 1 to 20 years. Defendant replied that he understood the penalties. He also understood the right to have the information served on him and the right to have the information read to him. He waived those rights. He was advised of the other pleas which he could enter, of the right to a jury trial, of the right to call witnesses in his own behalf and the right to cross-examine the State's witnesses, and of the right to remain silent. He was told that the plea of no contest would be treated by the court the same as a guilty plea for the purposes of sentencing. The defendant stated that he had not been subjected to any threats or promises in order to induce his plea and that he was tendering his plea of his own will.

Although the court did not inform the defendant of his right to counsel, the record does reflect that he was represented by counsel at all stages of the proceedings. To hold that it was error for a court to fail to tell a defendant that by pleading nolo contendere he had waived the right to counsel when, in fact, he had been accorded that right would be "the epitome of slavish technicality." *State v. Neal*, 216 Neb. 709, 712, 346 N.W.2d 218, 220 (1984).

A factual basis in support of the plea was provided by the county attorney, which, if uncontested, left no reasonable doubt of defendant's guilt. In a dialogue with the court, the defendant maintained his innocence, but conceded that the plea of no contest was in his best interests.

Although the court made no detailed finding resolving the conflict between a claim of innocence and a plea of no contest, the fact that defendant was eliminating the possibility of apparent certain convictions for four crimes providing for a maximum cumulative term of imprisonment of 110 years, to say nothing of an enhanced term for being a habitual criminal, makes it apparent that the plea met the test of *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). As paraphrased by defendant's appellate counsel in his brief, *Alford* requires that "[p]leas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the

claim of innocence." Counsel continues his argument by stating that "[t]he reasoning in Alford emphasized the importance of evaluating the evidence the state would offer against the defendant as a test of whether the plea was intelligently entered . . . ." Brief for appellant at 8-9.

This court, in *State v. Irish*, 223 Neb. 814, 820, 394 N.W.2d 879, 883 (1986), established the following rule:

> [I]n order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly,
>
> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.

The court concluded that

> the taking of the foregoing steps is sufficient to assure that a plea represents a voluntary and intelligent choice among the alternative courses of action open to a criminal defendant, the ultimate standard by which pleas of guilty or nolo contendere are to be tested. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971).

State v. Irish, supra at 820, 394 N.W.2d at 883.

Furthermore, defendant later appeared before the trial court asking to withdraw his plea, at which time his counsel stated to the court that such motion to withdraw the plea was against his (counsel's) advice. After further questioning by counsel in open court, defendant then stated that he did *not* wish to withdraw his plea. When asked what might have led him to request permission to withdraw his plea, defendant stated, "It's just

that I'm not guilty of the crime but I'm just tired of everything; as long as it's taken I just want to get it over with."

In light of the factual basis supplied by the State, the severity of the potential punishment defendant faced if he went to trial and was found guilty of all charges, and defendant's acknowledgment that the plea was in his best interests, it was reasonable for the trial court to accept his plea despite his protestations of innocence.

Regarding defendant's claim that his sentence was excessive, we have said that a sentence imposed within statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989).

In imposing a sentence, a trial court should consider, among other things, the nature of the offense and the amount of violence involved in the commission of the crime. *State v. Jones*, 232 Neb. 576, 441 N.W.2d 605 (1989). The seriousness of the offense is one of the important factors in setting a sentence, as is evidence of a defendant's character or previous conduct. *Id.*

Attempted first degree sexual assault is a serious offense. In this case, violence was involved when defendant threatened the victim with a knife held to her throat and when defendant sexually assaulted the victim. As to defendant's previous conduct, he has a lengthy record of criminal activity which has resulted in five periods of probation, three of which were concurrent, and two periods of incarceration in the penitentiary. In his second incarceration in the penitentiary, defendant served 5 years on concurrent 7- to 10-year sentences for first degree sexual assault and sodomy.

It is clear that there was no abuse of discretion on the part of the trial court in imposing sentence and that under the circumstances of this case the modified sentence is not excessive.

The judgment of the district court is affirmed.

AFFIRMED.

NORWEST BANK NEBRASKA, NATIONAL ASSOCIATION, A NATIONAL BANKING ASSOCIATION, APPELLEE, V. RICHARD G. KIZZIER AND YVONNE A. KIZZIER, HUSBAND AND WIFE, ET AL., APPELLEES, KIZZIER REALTY & INVESTMENT CO., INC., A NEBRASKA CORPORATION, APPELLANT.

446 N.W.2d 204

Filed September 22, 1989. No. 87-252.

1. **Equity: Appeal and Error.** In an action in equity, it is the duty of the Supreme Court to retry the issues of fact involved upon the evidence in the record and, upon such trial de novo, to reach an independent conclusion.
2. **Mortgages: Presumptions: Liens: Loans.** Nothing but payment or a formal release will discharge a mortgage. The existence of a lien securing an original loan furnishes a presumption that any renewal was not a discharge of the original, where the renewal is not secured.
3. **Promissory Notes: Debtors and Creditors.** The taking of a new note for an existing note is a renewal of the old indebtedness and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Robert G. Simmons, Jr., of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

Patrick J. Nelson, of Jacobsen, Orr, Nelson & Wright, P.C., for appellee Norwest.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

BURKHARD, D.J.

On January 6, 1986, Norwest Bank Nebraska, National Association (Norwest), plaintiff-appellee, brought an action to foreclose two trust deeds signed by defendants-appellees Richard G. and Yvonne A. Kizzier. The trust deeds secured promissory notes signed by Richard and Yvonne and defendant-appellee Roy Kizzier. Appellant, Kizzier Realty & Investment Co., Inc. (Kizzier Realty), joined as a defendant, held a mortgage covering the same property, which secured a note from Richard and Yvonne Kizzier, as personal guarantors, and Kizzier Chevrolet Company of Kearney. Several other

defendants who might claim an interest in the property by virtue of leases, mortgages, and judgments were also named in the foreclosure action.

The property covered by the trust deeds and mortgages is described as "[t]he East 192.0 feet of the West 337.0 feet of the South 391.2 feet of the Southwest 1/4 of the Southeast 1/4 of Section 34, Township 9 North, Range 16, West of the 6th P.M., Buffalo County, Nebraska, except the South 33.0 feet thereof." Richard and Yvonne Kizzier were record owners of the property.

A bench trial was held on December 10, 1986, after which the court determined the priority of the various liens and the amounts due and owing on each lien. In its order, the court found Norwest had a valid first lien by virtue of a note dated May 21, 1984, and a trust deed dated March 18, 1982, in the principal sum of $132,491.51, plus accrued interest of $30,420.53, for a total sum of $162,912.04, with interest in the principal sum at the rate of 14.5 percent per year from and after December 10, 1986, or $52.63 per day. The court found Kizzier Realty had a valid second lien upon the property by virtue of its note and mortgage dated December 23, 1982, in the principal sum of $500,000, plus accrued interest of $278,193.40, for a total sum of $778,193.40, with interest on the principal sum at the rate of 14 percent per year from and after December 10, 1986, or $191.78 per day. The court found Dwayne L. Kizzier held a valid third lien upon the property in the amount of $73,577.65, with interest at the rate of 18 percent per year, or $28.36 per day, and Kizzier Chevrolet Company, Inc., of Scottsbluff, Nebraska, held a valid fourth lien upon the property in the amount of $481,352.97, with interest at the rate of 9.5 percent per year, or $104.11 per day.

Kizzier Realty filed a motion for new trial, which was denied. Kizzier Realty perfected its appeal to this court. We affirm.

The history herein goes back to September 14, 1981, when Richard Kizzier, hereinafter called Richard, individually and as partner, and Yvonne Kizzier, hereinafter called Yvonne, individually, signed a note to First Savings Company of Kearney (First Savings) in the principal amount of $149,940, payable in five monthly payments of $3,678.99 beginning

October 14, 1981, and a final balloon payment of $151,969.22 due March 13, 1982. To secure the note Richard and Yvonne executed a trust deed on September 14, 1981, on the subject premises, with First Savings as beneficiary and Jeffrey H. Orr, attorney at law, as the trustee. A deed of reconveyance signed by the trustee on March 22, 1982, showed that the note had been paid and reconveyed the subject premises.

On March 18, 1982, Richard, individually and as a partner; Yvonne, individually; and Roy Kizzier, hereinafter called Roy, as partner, signed a note (No. 10080) to First Savings in the principal amount of $148,558.01, payable in five monthly payments of $3,542.78 beginning April 17, 1982, and a final balloon payment of $147,957.92 due September 14, 1982. To secure the note, Richard and Yvonne executed a trust deed on March 18, 1982, on the subject premises, with First Savings as beneficiary and Orr as trustee. The March 18 note was not paid when due.

On August 27, 1982, Richard, individually and as partner; Roy, individually and as partner; and Yvonne, individually, signed a note (No. 10137) to First Savings in the principal amount of $144,702.07, payable in five monthly payments of $3,557.43 beginning September 26, 1982, and a final balloon payment of $138,523.50 due February 23, 1983. The March 18, 1982, note was marked "RENEWED New Loan No. 10137 Date 8-27-82." The August 27 note shows that there is a lien on the subject premises evidenced by a trust deed "bearing even date herewith," although the note, in reference to the trust deed, refers to its being "[f]iled in Buffalo Co. 3-18-82 microfilm roll 82 page 1223," which is the correct recording information for the aforementioned trust deed executed by Richard and Yvonne on March 18. The August 27 note was also not paid when due.

On March 23, 1983, Richard, individually and as general partner; Yvonne, individually; and Roy, individually and as general partner, signed a note (No. 10207) to First Savings in the principal amount of $137,152.93, payable in five monthly payments of $3,713.60 beginning April 22, 1983, and a final balloon payment of $127,470.91 due September 22, 1983. The August 27 note was marked "RENEWED New Loan No.

10207 Date 3-23-83." The March 23 note also shows that there is a lien on the subject premises evidenced by a trust deed "bearing even date herewith," although the note, in reference to the trust deed, also refers to its being "[f]iled in Buffalo Co. 3-18-82 microfilm roll 82 page 1223." The March 23 note was also not paid when due, and further states on its face as follows: "The purpose of this loan is: rewrite loan #10137."

On May 26, 1983, Richard, Yvonne, and Roy, each individually, signed a note (No. 10222) to First Savings in the principal amount of $139,895.99, this note being payable in 11 monthly payments of $1,975 beginning June 24, 1983, and a final balloon payment of $138,219.56 due May 24, 1984. The March 23, 1983, note was marked "RENEWED New Loan No. 10222 Date 5-26-83." As on the August 27 and March 23 notes, the May 26, 1983, note also shows that there is a lien on the subject premises evidenced by a trust deed "bearing even date herewith," although the note, in reference to the trust deed, also refers to its being "[f]iled in Buffalo County 3-18-82 microfilm roll 82 page 1223." This note of May 26 was also not paid when due, and states on its face as follows: "The purpose of this loan is: rewrite #10207."

Finally, in the chronology of events, on May 21, 1984, Richard, Yvonne, and Roy, each individually, signed a note to First National Bank of Grand Island (No. 10316) in the principal amount of $137,777.55, payable in 11 monthly payments of $2,200 beginning July 5, 1984, and a final balloon payment of $134,721.84 due June 5, 1985. The May 26, 1983, note was marked "RENEWED New Loan No. 10316 Date 5-21-84." The May 21, 1984, note shows a mortgage on the subject premises "bearing even date herewith," and, in fact, on May 21, 1984, Richard and Yvonne did execute a trust deed on the subject premises, with "First Savings Company of Kearney n/k/a First National Bank of Grand Island" as beneficiary and Pat Nelson, attorney at law, as trustee. This note was also not paid when due, and states on its face as follows: "The purpose of this loan is: Rewrite 10222."

On May 1, 1984, the First National Bank of Grand Island merged with First Savings Company of Kearney, with the bank being the surviving corporation. On June 1, 1984, the title of the

First National Bank of Grand Island was changed to Norwest Bank Grand Island, National Association. On October 1, 1985, the said Norwest Bank Grand Island, National Association, merged into Norwest Bank Omaha, National Association, under the charter of Norwest Bank Omaha, National Association, and title of "Norwest Bank Nebraska, National Association," the plaintiff herein.

Appellant, Kizzier Realty, holds a mortgage to the same property signed by Richard and Yvonne. The mortgage was dated December 23, 1982, and filed January 4, 1983, in the Buffalo County register of deeds' office. The mortgage secures a note signed by Richard, as president of Kizzier Chevrolet Co. of Kearney, Inc., and Richard and Yvonne, as personal guarantors. The note, payable on demand, is in the principal sum of $500,000, with interest at 14 percent per annum, payable monthly. At the time of trial this note remained unpaid.

Plaintiff's petition generally asked for an order granting it possession of the subject premises and an accounting of the amounts due from defendants Richard, Yvonne, and Roy Kizzier on the note of May 21, 1984, and the trust deeds of March 18, 1982, and May 21, 1984. Kizzier Realty asked that the plaintiff's petition be dismissed and, on its cross-petition, that its lien be decreed to be a first lien upon the subject premises.

This is an action in equity. It is therefore the duty of the Supreme Court to retry the issues of fact involved upon the evidence in the record and, upon such trial de novo, to reach an independent conclusion. *O'Neill Production Credit Assn. v. Mitchell*, 209 Neb. 206, 307 N.W.2d 115 (1981).

In its first assignment of error, Kizzier Realty claims that the trial court erred in not determining that the plaintiff's installment loan was illegal in exceeding the statutory lending limit to one borrower. The second assignment of error states that the court erred in permitting the use of the judicial process and courts to collect (as against an individual party) the fruits of an illegal act. These two assignments of error shall be considered together.

Kizzier Realty claims that the notes of March 18, 1982, August 27, 1982, March 23, 1983, and May 26, 1983, exceeded

the loan authority of First Savings; that the charging and collecting of a prepaid finance charge on the note of May 26, 1983, was illegal; that there were illegal prepaid finance charges on the notes of March 18, 1982, and August 27, 1983; and that there were excessive finance charges on the note of March 18, 1982.

Assuming, but only for the sake of argument, that Kizzier Realty's claims of illegality have merit, the following facts are clear. Kizzier Realty was not a party to any of the allegedly illegal notes; Richard and Yvonne, in their answer to plaintiff's petition, made no defense that any of the notes were illegal; Roy, who also signed the notes in question, did not file an answer or other responsive pleading to plaintiff's petition and therefore raised no defense of illegality; none of the alleged illegal notes were sued upon by the plaintiff in this action, since they all have zero balances; and the only note sued upon by the plaintiff is the note of May 21, 1984, to First National Bank of Grand Island, and it is not claimed to be illegal in any way. There is therefore no merit to Kizzier Realty's first two assignments of error.

In its third assignment of error, Kizzier Realty states that the trial court erred in not finding the March 18, 1982, note paid and the security extinguished. The fourth assignment of error states that the court erred in not finding that the 1984 transaction was a new transaction and that the 1982 obligation had been extinguished (as a new transaction or novation) and therefore offered no security for the 1984 transaction. The sixth assignment of error alleges that the trial court erred in not finding that the security of Kizzier Realty was prior to that of the plaintiff. These assignments of error are interrelated and therefore are considered together.

The evidence is clear that the four notes (March 18, 1982, August 27, 1982, March 23, 1983, and May 26, 1983) were all renewed, and were not, as Kizzier Realty contends, paid.

Patricia A. Cook was the manager at First Savings from January 1, 1981, to October 18, 1983. Her testimony by way of deposition certainly indicates that the parties intended that the notes would be renewed. For example, credit life insurance on the March 18, 1982, note was for a term of 72 months. At about

the time the balloon payment was due on the March 18 note, Cook talked to Richard about restructuring said note, and those discussions culminated in the note of August 27, 1982. The balloon payment on the August 27 note was renegotiated with the Kizziers, and the restructuring was reflected in the note of March 23, 1983. One of the Kizziers (presumably Richard) came to Cook and said he was unable to make the monthly payments of $3,713.60 called for in the March 23 note, but felt he could make payments of $1,975. The note of May 26, 1983, calling for monthly payments of $1,975 was then executed.

James R. Clark, vice president and manager of Norwest in Kearney, testified in his deposition that he talked to Richard about the balloon payment that was due on May 24, 1984, in connection with the May 26, 1983, note. This discussion took place before the balloon payment was due. Clark testified that Richard agreed to renewing the May 26 note "at the terms that we had," and, based upon the conversations with Richard, the note of May 21, 1984, was prepared and executed.

A case very much in point is *Kehr v. Blomenkamp*, 171 Neb. 304, 106 N.W.2d 179 (1960), in which the plaintiff sued to foreclose a mortgage on certain real estate given on February 16, 1955, by defendants Blomenkamp to the plaintiff to secure a promissory note of even date therewith in the amount of $15,000. A promissory note in the amount of $8,000 was given by defendants Blomenkamp to the plaintiff as of June 1, 1956. The $8,000 was the balance due on the $15,000 note as of June 1, 1956. J.H. Melville Lumber Company was made a party defendant by reason of the fact that the Blomenkamps had given it a mortgage on the same real estate on November 14, 1956. This mortgage was assigned to Melville Investment Company, which became a substitute defendant. Universal Surety Company was a party defendant because the Blomenkamps had given it a mortgage on the same real estate on December 3, 1956. Defendant Universal Surety denied the validity of the mortgage which the plaintiff sought to foreclose, alleging that the note for $8,000 was a new obligation and transaction which was not secured by the mortgage. Universal Surety also denied the validity of the mortgage of Melville Investment and sought a foreclosure of its own mortgage as a

first lien on the real estate. Melville Investment contended that the lien of its mortgage had priority over the mortgage of Universal Surety. In finding the mortgage of the plaintiff to be a first lien, the mortgage of Melville Investment to be a second lien, and the mortgage of Universal Surety to be a third lien, the trial court found that the mortgage given to the plaintiff on February 16, 1955, to secure the $15,000 note remained as security for the $8,000 note given as of June 1, 1956, and as such was a first lien on the real estate. The effect of the trial court's finding was that the $8,000 note was a renewal note for the balance due on the $15,000 note "in consequence of which the obligation and security of the mortgage remained in full force and effect." *Id.* at 307, 106 N.W.2d at 181.

In affirming the trial court, this court, in *Kehr*, stated as follows:

> The principles of law on which this question must be determined were stated early in the decisions of this state. There has been no departure from the early statements. In Davis v. Thomas, 66 Neb. 26, 92 N.W. 187, it was said: "Nothing but payment or a formal release will discharge a mortgage. The existence of a lien securing the original loan, furnishes a presumption that any renewal was not a discharge of the original, where the renewal is not secured."
>
> This principle was approved in Auld v. Walker, 107 Neb. 676, 186 N.W. 1008. The following was also said in this case: "The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt."
>
> In Berwyn State Bank v. Swanson, 111 Neb. 141, 196 N.W. 125, these principles were approved in the following words: "But, whatever the rule may be in other jurisdictions, it is well settled in this state that—'The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.' " [Citations

> omitted.]
>
> By what was said in these cases it is clear that the specific agreement that a new note will extinguish the original debt must be one between the parties to the transaction.
>
> In the record before this court there is no evidence either direct or circumstantial in proof of a specific agreement between the plaintiff and the defendants Blomenkamp that the note for $8,000 should or would extinguish the original debt.
>
> This lack of evidence renders applicable and controlling in this case the unvaried rule that the existence of a lien securing an original loan furnishes a presumption that any renewal was not a discharge of the original where the renewal is not secured, the effect of which is to say that the contention of the appellant that the mortgage was released is presumptively without merit.

Kehr v. Blomenkamp, 171 Neb. 304, 307-08, 106 N.W.2d 179, 181 (1960). See, also, *First West Side Bank v. Herzog*, 204 Neb. 356, 361, 282 N.W.2d 38, 41 (1979), which not only fortifies *Kehr*, but further holds: "In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place."

In the instant case, there is no evidence to indicate an intent on the part of the plaintiff and Richard, Yvonne, and Roy to extinguish the debts evidenced by the four notes (March 18, 1982, August 27, 1982, March 23, 1983, and May 26, 1983) and substitute a new agreement in each case in place of the old. The intent was clearly to renew the notes, not extinguish them, and the trust deed of March 18, 1982, was therefore not released by the subsequent notes. As regards the trust deed of May 21, 1984, it is mere surplusage. It follows that there is no merit to Kizzier Realty's third, fourth, and sixth assignments of error.

Kizzier Realty's fifth assignment of error is that the trial court erred in giving priority for more than was loaned. This assignment is somewhat unclear. In any event, there was unrefuted evidence from Gary L. Ott, vice president of special loan administration for the plaintiff, that the principal balance owing on the May 21, 1984, note as of December 10, 1986, was

$132,491.51 and total accrued interest as of that date was $30,420.53, or a total of $162,912.04, with interest at $52.63 per day. These are the same figures that are in the district court's judgment. The fifth assignment of error is also without merit.

The judgment of the district court is affirmed.

AFFIRMED.

KENNETH B. KNOX AND MARILYN M. KNOX, APPELLANTS, V. WILLIAM W. COOK, JR., ET AL., APPELLEES.

446 N.W.2d 1

Filed September 22, 1989. No. 87-868.

1. **Contracts.** Whether a document is ambiguous is a question of law initially determined by a trial court.
2. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
4. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
5. **Contracts: Intent.** If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and the intention of the parties to the document must be determined from the contents of the document.
6. **Contracts: Guaranty.** A guaranty, as any other contract, must be interpreted by reference to the entire document with meaning and effect given to every part of the guaranty whenever possible.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded with directions.

John S. Pierce, of Rembolt Ludtke Parker & Berger, for appellants.

James G. Sharp, of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Kenneth B. and Marilyn M. Knox brought an action in the district court for Gage County to recover on a personal guaranty signed by the defendants, David O. Carlson, William W. Cook, Jr., and Walter G. Nickel. The district court, after finding that the provisions of the guaranty were ambiguous, received extrinsic evidence regarding the parties' intent for the guaranty and subsequently determined that the defendants were not liable to Knoxes on the guaranty.

Knoxes appeal and contend that (1) the district court erred in its conclusion that the guaranty was ambiguous, (2) the district court erred in quashing a subpoena served on Carlson and Cook, and (3) the judgment that the defendants were not liable under their guaranty is unsupported by the evidence.

In April 1981, Knoxes entered a written lease with N Double C, Inc. Carlson, Cook, and Nickel were the sole shareholders of N Double C. Pursuant to the lease, Knoxes were required to construct on their real estate a restaurant which N Double C would then lease for a 15-year term. Knoxes wanted Carlson, Cook, and Nickel to give their personal guaranty for the payments required by the lease to N Double C. The lease called for a monthly payment of $5,437.50 as rent due on the first day of each month during the lease and, among its several provisions, contained the following:

> 16. In case of default by lessee [N Double C], David O. Carlson, Walter Nickel, and William W. Cook, Jr., the sole shareholders of N Double C, Inc., will guarantee the monthly payments as heretofore set out until the property herein described is re-leased or up to a term of thirty-six (36) months, whichever is sooner.

Notwithstanding the lease provision for a guaranty, the defendants signed a "Personal Guarantee," which was appended to the Knox-N Double C lease and provides:

> David O. Carlson, Walter Nickel and William W. Cook, Jr. represent that they are the sole owners of all the issued and outstanding stock of the lessee corporation, and that

they personally, jointly, and severally guarantee the faithful and full performance by the lessee of its obligations under this lease, to the following extent.

In the event that the corporation should default under this lease agreement at any time during its term, the guarantors will guarantee the monthly payments set out in the original lease until the property is re-leased or up to a term of thirty-six (36) months, whichever is sooner.

/s/ David O. Carlson
David O. Carlson
/s/ Walter Nickel
Walter Nickel
/s/ William W. Cook, Jr.
William W. Cook, Jr.

Knoxes constructed the restaurant, which N Double C occupied in November 1981. N Double C paid its monthly installments of rent through November of 1985, but failed to pay the rent installment due on December 1, 1985. On January 24, 1986, Knoxes' lawyer sent a letter to the defendants' lawyer, requesting that the defendants pay the then delinquent rent (December 1985 and January 1986). On January 29, 1986, defendants' lawyer responded to Knoxes' demand: "I feel that a fair construction of the guaranty portion of the lease agreement is that it is only in effect for the first thirty-six (36) months from the signing of the lease agreement. That time has expired." N Double C vacated the premises and removed all its equipment sometime between January and May of 1986.

Knoxes attempted to relet the property by listing it with a real estate agency and initially asked $35,000 annual rent, which was reduced to rent of $24,000 per year in June 1986, and again reduced, this time to $22,000 per year in December 1986.

In response to Knoxes' action based on N Double C's default regarding the lease and the defendants' guaranty, Carlson and Cook stated in their answer: "The term of the guarantee under said lease expired three years from the inception of said lease and, therefore, no liability is due from these Defendants to Plaintiffs." Additionally, Carlson and Cook alleged: "Plaintiffs have not made good faith efforts to mitigate the damages of the Defendants and to make reasonable efforts to

lease the property for a commercially reasonable amount and, therefore, are barred from any recovery under the terms of said lease." In his separate pleading, Nickel not only denied liability in a verbatim restatement of the defensive allegations made by Carlson and Cook, but also cross-claimed against Carlson and Cook on account of an alleged indemnity agreement among the defendants to the effect that Carlson and Cook indemnified Nickel "against any claims and demands arising as a result of the" guaranty for the Knox-N Double C lease.

Knoxes obtained service of a subpoena duces tecum on Carlson and Cook, who moved to quash the subpoena. The court sustained the motion by Carlson and Cook and quashed a portion of the subpoena.

Kenneth Knox testified that N Double C had defaulted in the payment of all rent due for the period from December 1, 1985, to April 14, 1987, the date of trial. The defendants offered no evidence to contradict Kenneth Knox's testimony concerning N Double C's default in the payment of rent.

At the conclusion of evidence, the district court found: "Said premises have not been re-leased since [N Double C's] default notwithstanding plaintiffs' efforts so to do; plaintiffs' efforts in such regard have been reasonable and proper in the circumstances." Further, the district court concluded that the guaranty's language "or up to a term of thirty-six (36) months" was ambiguous. In view of such ambiguity, the court allowed the defendants to testify concerning their intention for the guaranty. In substance, the defendants testified that the phrase "or up to a term of thirty-six (36) months" meant that the defendants' guaranty existed only for the first 36 months of the Knox-N Double C lease. Thus, according to the defendants, their guaranty expired in 1984, that is, 3 years after the lease was signed by Knoxes and N Double C. In view of the defendants' testimony, the district court concluded that the guaranty's language "up to a term of thirty-six months" was a reference to the duration of the guaranty's existence for 36 months from commencement of the Knox-N Double C lease and was not a reference to the period or temporal extent of the defendants' liability after N Double C's default on the lease. Consequently, in the judgment entered, the district court stated that "more

than three years having elapsed from the beginning of the lease period before default occurred thereon, defendants are not now obligated to pay plaintiffs any sums under their guarantees." The court then dismissed Knoxes' action.

In their appeal, Knoxes contend that the defendants' guaranty is not ambiguous and request that the district court's judgment be reversed with direction to enter judgment for Knoxes, that is, judgment for $92,437.50 (delinquent rent from December 1985 to and including April 1987, or 17 months) with prejudgment interest. The defendants maintain that their guaranty is ambiguous, and, therefore, the district court's judgment, determining the intent for the guaranty, is correct. The defendants have not cross-appealed to challenge the district court's finding that the Knoxes have exerted reasonable efforts to relet the leased premises previously occupied by N Double C.

Whether a document is ambiguous is a question of law initially determined by a trial court. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). "Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). See, also, *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987). See, also, *National Farmers Union Serv. Corp. v. Edwards*, 220 Neb. 231, 369 N.W.2d 76 (1985) (a document is ambiguous if, after application of the pertinent rules for construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties). The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988). If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and

the intention of the parties to the document must be determined from the contents of the document. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

"Nebraska adheres to the rule of strict construction of guaranty contracts. . . . '. . . When the meaning of the contract [guaranty] is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.' " *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 293, 417 N.W.2d 162, 163 (1987) (quoting *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922)).

A guaranty, as any other contract, must be interpreted by reference to the entire document with meaning and effect given to every part of the guaranty whenever possible. *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb. 292, 237 N.W.2d 645 (1976).

Applying the foregoing rules of construction or interpretation for a document, we conclude that the guaranty in the present case is unambiguous. The guaranty provides that the defendants will "guarantee" rental payments "[i]n the event that the corporation should default under this lease agreement *at any time during its term*" (emphasis supplied), which term the defendants knew was 15 years. The guaranty's provision limiting the defendants' liability to "a term of thirty-six (36) months" clearly refers to the period of the defendants' liability after N Double C's default on the lease from Knoxes. As the result of the guaranty and on N Double C's default on the Knox lease, the defendants obligated themselves to pay the rent, which accrued but was unpaid, for each of the ensuing 36 months throughout the term of the lease remaining after the default by nonpayment of rent or to pay the rent until the premises were relet, whichever occurred first. The defendants suggest that the guaranty's language "up to a term of thirty-six (36) months" means that the guaranty was effective only for the first 36 months of the Knox-N Double C lease. The construction suggested by the defendants is completely inconsistent with the guaranty's provision for the defendants' liability if N Double C "should default under this lease agreement at any time during its term," that is, default any time

during the 15-year term of the lease from Knoxes. While the defendants point out that the lease provision regarding a guaranty does not include the language "at any time during its term," we cannot ignore that the terms of the defendants' guaranty for performance of the lease, not the terms of the lease, identify and determine the scope of the defendants' personal liability under their guaranty. See *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 170, 266 N.W.2d 736, 740 (1978):

> The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral.

Therefore, as a matter of law, we conclude that the district court erred in finding that the guaranty was ambiguous. The guaranty obligates the defendants to pay the installments of the monthly rent which N Double C has failed to pay and which Knoxes seek to recover. The district court found that Knoxes have made reasonable efforts to mitigate damages which they have incurred to the date of trial, a finding from which no appeal has been taken. The undisputed evidence establishes that at the date of trial, N Double C had defaulted in the payment of rent for 17 months. With each monthly installment of $5,437.50, the delinquent rent amounted to $92,437.50 at the date of trial. Under the circumstances and as a matter of law, Knoxes are entitled to a judgment against the defendants for the unpaid rent of $92,437.50 prescribed by the Knox-N Double C lease.

As they did at trial and now on appeal, Knoxes ask for prejudgment interest. Neb. Rev. Stat. § 45-103.02 (Reissue 1988) prescribes the conditions for allowance of prejudgment interest on all causes of action accruing on or after January 1, 1987, subject to the exclusions in Neb. Rev. Stat. § 45-103.04 (Reissue 1988), and states:

> [J]udgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the

> judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer . . . .

Section 45-103.04 provides:

> Judgment interest shall not accrue prior to the date of rendition of judgment for:
>
> (1) Any action arising under Chapter 42; or
>
> (2) Any action involving the state, a political subdivision of the state, or any employee of the state or any of its political subdivisions for any negligent or wrongful act or omission accruing within the scope of such employee's office or employment.

Nothing indicates that Knoxes made a written offer for settlement of their claim against the defendants. However, a cause of action accrued for Knoxes on December 1, 1985, and on the first day of each month thereafter, when N Double C defaulted in the payment of rent due at the specified time. In view of N Double C's default on installment payments of rent due on the first day of each month, a separate cause of action accrued in favor of Knoxes for each month's rent which was not paid by N Double C. Therefore, at the date of January 1, 1987, N Double C was in default for 13 months' rent.

> Prejudgment interest is allowed where the amount of the claim is liquidated. When reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed. *Graff v. Burnett*, 226 Neb. 710, 414 N.W.2d 271 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986).

Lutheran Medical Center v. City of Omaha, 229 Neb. 802, 810, 429 N.W.2d 347, 352 (1988).

We have decided, as a matter of law, that the defendants' guaranty in issue is unambiguous. Consequently, no reasonable controversy existed concerning the provisions of the guaranty inasmuch as the defendants make no challenge to the guaranty beyond the alleged ambiguity. The amount recoverable under

the guaranty is not disputed, that is, 17 months' delinquent rent at $5,437.50 per month. The amount of Knoxes' claim is, therefore, liquidated. The Knox-N Double C lease contains no provision for interest assessable on a delinquent payment of rent. Neb. Rev. Stat. § 45-104 (Reissue 1988) specifies the legal rate of interest as 12 percent per annum. For that reason, Knoxes are entitled to prejudgment interest at the rate of 12 percent per annum in accordance with § 45-104, assessable from the date of delinquency for each unpaid installment of rent due under the Knox-N Double C lease. However, in accordance with § 45-103.02, Knoxes are not entitled to prejudgment interest on rent which accrued on or after January 1, 1987.

On account of our decision regarding the issue of the guaranty involved in this appeal, it is unnecessary to consider Knoxes' other assignments of error.

Therefore, we reverse the judgment of the district court and remand this matter to the district court with direction to enter judgment in the principal amount of $92,437.50 in favor of Knoxes and against the defendants. Further, as a part of the judgment entered on remand, the district court shall allow prejudgment interest to Knoxes in accordance with this opinion. Because the record does not disclose that the cross-claim of Nickel against Carlson and Cook has been disposed of, we remand this matter to the district court for disposition of Nickel's cross-claim against Carlson and Cook.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

I dissent from that part of the majority opinion that seems to hold that compliance with Neb. Rev. Stat. § 45-103.02 (Reissue 1988) is a prerequisite to the recovery of prejudgment interest in all situations. Rather, I would hold that the section is an addition to those cases where prejudgment interest is allowed pursuant to Neb. Rev. Stat. § 45-104 (Reissue 1988).

The application of the conditions in § 45-103.02, specifically that of a greater recovery than demanded, will result in denial of justified prejudgment interest. If one demands a delinquent payment and subsequently sues and recovers a judgment for the delinquent payment, prejudgment interest must be denied,

since plaintiff's first offer of settlement is "[not] exceeded by the judgment."

The result, I submit, is contrary to the plain intent of the statute, i.e., to encourage settlements, not to offer a boon to deadbeats.

BOSLAUGH and FAHRNBRUCH, JJ., join in this dissent.

BANK OF BURWELL, A NEBRASKA BANKING CORPORATION, APPELLANT, V. ROGER KELLEY ET AL., APPELLEES.

445 N.W.2d 871

Filed September 22, 1989. No. 87-880.

1. **Uniform Commercial Code: Guaranty: Notice: Words and Phrases.** One who guarantees payment of another's debt is a "debtor" entitled to notice pursuant to the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
2. **Uniform Commercial Code: Security Interests: Notice.** Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.
3. **Uniform Commercial Code: Guaranty: Security Interests: Notice.** Whether a creditor's notice under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980) sufficiently informs a guarantor of his or her status as such, of the default of the principal debtor, and of the guarantor's obligations, rights, and stake in the collateral, and is therefore reasonable, must be determined in light of the entire conduct of the parties.
4. **Summary Judgment.** Summary judgment is appropriate where there exists no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

T. Randall Wright, of Dixon & Dixon, P.C., for appellant.

Richard P. Garden, Jr., of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiff, Bank of Burwell, appeals from the summary judgment entered in favor of defendants-appellees, Rex Kelley, Roger Kelley, and Florence Kelley White, sometimes hereinafter collectively referred to as the "defendant Kelleys," asserting two assignments of error which merge to challenge the district court's conclusion that plaintiff's notices of sale sent pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980) were unreasonable as a matter of law and thus would not support a claim for deficiency judgments. We reverse and remand for further proceedings.

Prior to 1976, one Max Kelley, who was a defendant in the trial court but is not a party to this appeal, operated a well-drilling business with Ronald Jensen under the name of Jensen Kelley. In 1976, Max Kelley decided to purchase Jensen's interest in the business. In order to raise capital for this purchase, Max Kelley formed Kelley Irrigation, Inc., and sold stock in the corporation to his mother, the aforenamed Florence Kelley White, and to his brothers, the aforenamed Rex and Roger Kelley. Max Kelley became president and Roger Kelley a vice president of the corporation. While the record is not entirely clear with respect to the official titles of Rex Kelley and Florence Kelley White at given times, it appears that Florence Kelley White served as secretary at the inception of the corporation and later became treasurer. Rex Kelley apparently initially served as treasurer and later became second vice president.

On June 17, 1976, plaintiff loaned the corporation $170,000. At that time each of the Kelley brothers and their mother executed a guaranty agreement, under the language of which each of the four personally guaranteed any future indebtedness the corporation might incur.

Plaintiff's records indicate that the original loan was stamped paid on August 26, 1976. While the record does not provide a means of ascertaining with certainty a complete and detailed record of the corporation's borrowings from June 17, 1976, to March 20, 1985, the date on which the last note was executed, it does show that the corporation had once repaid its entire indebtedness to the plaintiff and that such repayment

occurred sometime prior to 1978.

On April 3, 1978, plaintiff made the corporation another loan of $50,000. Through various renewals and advances taking place from April 3, 1978, to March 20, 1985, the debt grew to $290,000. It appears that all of the notes were signed only by Max Kelley as president of the corporation, including the final $290,000 note dated March 20, 1985, and due on September 16, 1985. The March 20 note references the June 17, 1976, guaranty as part of plaintiff's security on the loan.

Plaintiff's officers had become concerned about the corporation's debt, and on September 28, 1984, plaintiff's then president, Robert McEvoy, sent a letter to Max Kelley and each of the defendant Kelleys informing them that the corporation's line of credit was nearly 90 days past due and reminding them of their status as guarantors. Later in the fall of 1984, McEvoy again wrote to each of the guarantors. Those letters read as follows:

> This is to advise you as an officer as well as a personal guarantor on the above captioned line of credit, that the severely past due note of your corporation must be brought current no later that [sic] December 3, 1984.
>
> If this second letter is also ignored we will take legal action in this matter. Further, be advised that if the total liquidation of this corporation does not pay the entire principle [sic] plus interst [sic] on this loan, we will then move for a deficiency judgement against your personal assets to the extent necessary to pay the total remaining balance due.

On March 20, 1985, McEvoy sent a second letter to each of the four guarantors, prepared on bank letterhead but signed by Max Kelley, revealing the March 20, 1985, renewal of the corporation's loan. This letter also indicated that the guaranties served as part of the security on the loan.

The March 20, 1985, letters were immediately followed by March 22, 1985, letters which were signed by McEvoy. These referenced the letter over Max Kelley's signature, referenced an enclosed copy of the June 17, 1976, guaranty, confirmed the acquisition of additional collateral from the corporation, and advised the guarantors that plaintiff was "still relying heavily

on your personal guarantee as a very important part of this new arrangement with the corporation."

Subsequently, on September 10, 1985, McEvoy again sent letters to each of the guarantors, informing them that the March 20, 1985, note was due on September 16, 1985, and asking them to "[p]leas [sic] make arrangements to meet this company and personal obligation. . . ."

On March 31, 1986, plaintiff's attorney signed and sent a letter to each of the guarantors, which read:

> You will recall that on June 17, 1976 you executed a Guaranty to the Bank of Burwell to induce the Bank of Burwell to lend money to Kelley Irrigation, Inc., Burwell, Nebraska. Pursuant to that Guaranty, and in reliance thereon, the Bank did lend monies to Kelley Irrigation, Inc. Presently, the corporation owes to the Bank the amount of $290,000.00 plus interest, and that amount has been past due since September 16, 1985. From that time the Bank has worked with the corporation in an attempt to effect an orderly liquidation of the assets. However, to date the corporation has been unable to achieve that goal. We have notified the corporation that if the notes are not paid by April 15, 1986, the Bank will seek legal recourse for the recovery of the amount of the Note and interest. If the amount is not paid by that time, we will be looking for payment from you under the terms of the Guaranty agreement. We would like your cooperation in helping to achieve a workout of this matter so that we can maximize the proceeds of the liquidation and thereby reduce the amount of your liability under the Guaranty. Please contact this office within ten (10) days from the date of this letter so that we can arrange a meeting of the corporation officials and the Guarantors so that the matter can be amicably worked out in the best interests of all parties.

On May 1, 1986, plaintiff's attorney signed and sent another letter to each of the guarantors. This letter indicated that because he had received no response with respect to his earlier letter, plaintiff had filed suit against the "corporation and its Guarantors." The letter also declares:

> In principle, the bank would rather work these things out amicably than to proceed through litigation. As a practical matter, if the bank can solicit your help in liquidating the assets of the corporation, such a voluntary liquidation almost always will bring a greater price than would a forced sale. When one considers that each of you are [sic] personally liable for the indebtedness of the corporation, it would seem to be an advantage to you that the corporation obtain liquidation at the highest possible prices. The bank intends to proceed in each of the matters of litigation to judgment and collection, unless an earlier amicable resolution can be reached.

The defendant Kelleys acknowledge that they received correspondence from plaintiff and its attorney and that they ignored such correspondence based on the belief, notwithstanding the language of the June 17, 1976, guaranty agreement, that the guaranty covered only the initial $170,000 loan and that they thus no longer guaranteed the corporation's debt.

While the defendant Kelleys testified that they ignored the correspondence sent by plaintiff, it appears they did contact an attorney at least as early as June of 1986 in response to this lawsuit.

In any event, on June 18, 1986, plaintiff obtained a judgment allowing it to repossess the corporation's personalty on or after August 25, 1986. Plaintiff then took possession of and began the process of liquidating that collateral.

Prior to selling any of the collateral, plaintiff sent separate notices of such sale to the corporation and to each of the guarantors as "Mr. Max Kelley, President of Kelley Irrigation, Inc.," "Max Kelley," "Florence Kelley White," "Rex Kelley," and "Roger Kelley." The first mailing of such notices apparently took place on August 30, 1986. In most instances, plaintiff also sent copies of the notices to the defendant Kelleys' attorney.

One set of notices with respect to the sale of some of the repossessed property of the corporation was apparently prepared by plaintiff's senior vice president. This set relates to an auction of some of the repossessed property of the

corporation and differs slightly from other notices which plaintiff sent with respect to the sale of other collateral. Other sets of notices were prepared on what appears to be a "standard" form used by plaintiff to notify debtors of an upcoming sale of collateral. A review of these two forms of notice makes it apparent that if the standard form provided reasonable notice to the guarantors, then the other form also provided adequate notice.

The following is a typical example of the standard form notice:

NOTICE OF PRIVATE SALE OF COLLATERAL
ON DEFAULT

To: [Name and address of notice recipient] Date: November 25, 1986

Please take Notice that pursuant to a security agreement, dated March 20, 1986, between Kelley Irrigation, Inc. and the Bank of Burwell, Burwell, NE, County of Garfield, which was filed in the office of the Clerk of the County of Garfield, State of Nebraska, the undersigned shall sell at private sale your 1972 Ford F-750 Truck with 10 T. Smeal

which was the collateral pledged pursuant to the security agreement described above, due to the default of the note. The collateral shall be offered for sale at Kelley Irrigation Inc. Building in Burwell, County of Garfield, State of Nebraska, on Dec. 2, , 1986, after 12:00 p.m. The above collateral items are listed with the offered price from the following individual. You will be liable for any deficiency resulting from the sale of the collateral. You may redeem the collateral by paying the amount due on the obligation secured by the security agreement at any time prior to the date of the sale. This notice is given pursuant to UCC 9-504(3).

Offer to Purchase From: Tom Mosier
22946 Fox Street
Cassopolis, Michigan 49031

Respectfully submitted by:
/s/ Paul E. Rainbolt, S.V.P.
THE BANK OF BURWELL
P.O. Box 610
Burwell, NE 68823

Neb. U.C.C. § 9-504(1) (Reissue 1980) provides that after default, a secured party may sell the collateral. Insofar as is relevant to our inquiry, § 9-504(3) requires that "reasonable" notice be sent the debtor of the intended disposition of the collateral. One who guarantees payment of another's debt is a "debtor" entitled to notice pursuant to the foregoing statute. *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989); *General Electric Credit Corp. v. Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *Allis-Chalmers Corp. v. Haumont*, 220 Neb. 509, 371 N.W.2d 97 (1985); *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983).

We have said that "compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency." *First Nat. Bank & Trust Co. v. Hermann*, 205 Neb. 169, 172, 286 N.W.2d 750, 751-52 (1980), citing *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974). This rule has also been applied and followed in *American Honda Finance Corp. v. Bennett, supra*; *General Electric Credit Corp. v. Lewis, supra*; *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*; and *First Nat. Bank & Trust Co. v. Hughes, supra*. " '[T]he burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. . . . Failure to give notice is an absolute bar to the recovery of a deficiency.' " *Citizens State Bank v. Sparks*, 202 Neb. 661, 664, 276 N.W.2d 661, 663 (1979), citing *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976).

In *Hughes*, *Hi-Bo Farms*, *Lewis*, and *Bennett*, the central issue was whether the creditors had provided guarantors with reasonable notice as required by § 9-504(3). Because of the resolution we reach, it becomes necessary to make a detailed

review of each of the four cases last mentioned.

In *Hughes*, Vernor and Diana Hughes personally guaranteed a loan from First National Bank of Fremont to Central Auto & Truck Supply, Inc. Central Auto assets secured the loan. Vernor Hughes was president of Central Auto, and Diana Hughes was secretary of the corporation. On April 1, 1981, after Central Auto defaulted on the loan and the bank had obtained possession of the securing assets, it sent the following letter to the Hughes residence:

> "Mr. Venor [sic] Hughes, President
> Central Auto & Truck Supply
> 1558 East 5th
> Fremont, NE. 68025
>
> RE: Loan #869930
> Collateral: Financing Statement 5-9-74
>
> Dear Mr. Hughes:
>
> "This is to notify you that, in connection with the repossession of the above collateral involved in the abovee [sic] account, you may redeem said collateral and terminate the contract relating thereto by payment of $51,417.90 plus interest and expenses any time prior to the sale of said collateral on the date designated below. It is possible for this sum to increase should further expenses of any nature be incurred by our bank.
>
> "In the event you are not able to fully redeem the collateral or make suitable arrangements for redemption, the collateral will be sold at private sale on or after April 10, 1981 at the present place of storage which is 245 East 5th St., and First National Bank & Trust Company of Fremont.
>
> "Local, State and Federal laws permitting, you will be held liable for any deficiency declared owing after disposal of this collateral."

Id. at 44-45, 332 N.W.2d at 676.

The bank then sold a portion of the securing assets. In determining that the notice was unreasonable and that the bank was thus precluded from obtaining a deficiency judgment against the Hugheses as guarantors of the Central Auto debt,

the court said:

> The April 1 notice in this case makes no reference to the guaranty; indeed, it makes reference only to the "Financing Statement 5-9-74," in fact a security agreement dated May 24, 1974, a document which was signed individually by neither Mr. Hughes nor Mrs. [Diana] Hughes. In that regard the notice fails to apprise either Mr. or Mrs. Hughes that a personal deficiency judgment might be sought against any one of them in his or her capacity as guarantor of the corporation's debt. Secondly, as between Mr. Hughes and Central Auto, the matter as to whom the notice was sent is ambiguous. The interest of Mr. Hughes in this context conflicts with that of the corporation. It cannot be said that the notice, as addressed, unmistakably advises Mr. Hughes personally that he is the "you" who may be held "liable for any deficiency declared owing after disposal of this collateral." To assume that Mr. Hughes would know that a deficiency could not be obtained against the bankrupt Central Auto is to assume something not supported by the record before us. Although the statement that ambiguous language is to be construed against the drafter of the language is generally applied in the case of insurance policies, *Niemeyer v. Estate of Tichota*, 191 Neb. 484, 215 N.W.2d 885 (1974), the reasoning behind that rule is equally applicable to notices of the nature involved here.

First Nat. Bank & Trust Co. v. Hughes, 214 Neb. 42, 46-47, 332 N.W.2d 674, 677 (1983).

In *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987), Hi-Bo purchased farm machinery on a retail installment contract. Four of its corporate officers, namely Dale Hinz, president; Carol Hinz, secretary; Allen Bors, vice president; and Janice Bors, treasurer, each personally guaranteed the installment debt. After Hi-Bo had defaulted on the obligation and had surrendered possession of the machinery to the creditor, Deutsche Credit Corporation, Deutsche mailed a separate notice of private sale of the collateral to Hi-Bo, as well as to each of the guarantors. Each notice read as follows:

"RE: HI-BO FARMS INC.

"You are hereby notified by and on behalf of the undersigned secured party that by virtue of the default under the terms and provisions of a security agreement executed by the captioned Debtor dated 06-28-81, the undersigned secured party, holder of the aforesaid agreement and the indebtedness represented therby [sic] will, on or after 08-18-84 make one or more private sales or other dispositions of our right, title and interest in and to the goods described in said agreement, which goods may be described as follows:

ONE WHITE 9700 COMBINE S/N 97-20218 W/CORNHEAD S/N A90065, AND KWICK CUT HEAD S/N 912118

The net proceeds of sale (less expenses incurred) shall be, in accordance with said agreement, applied to the reduction of total obligation due and owing by Debtor to the undersigned secured party.

"Dated this 7TH day of AUGUST, 1984.

Deutsche Credit Corporation"

Id. at 465, 398 N.W.2d at 695.

Deutsche sold the equipment on October 3, 1984, and subsequently sought a deficiency judgment against the corporate officers who had personally guaranteed the Hi-Bo debt. In upholding the summary judgment dismissing Deutsche's petition, the court wrote:

> The guarantors contend that the notices in the present case are indistinguishable from the notice in *Hughes*. Plaintiff argues that, on the contrary, its notices are different from the notice in *Hughes* in several important respects. First of all, while in *Hughes* there was but a single notice, in the present case each of the guarantors was sent a separate notice. While the notice in *Hughes* was addressed to the president of the corporate debtor, each of the notices to the guarantors in this case was addressed to a guarantor individually, and no reference was made to the guarantor's capacity as an officer of the corporate debtor. While the notice in *Hughes* directed specific attention to

"Collateral: Financing Statement 5-9-74," which the guarantor had not signed, the notices in this case directed attention to the entire "HI-BO FARMS INC." transaction. Plaintiff concludes that these distinctions are such that the guarantors had no reasonable basis to conclude that the notices were sent to them in their capacity as corporate officers rather than to them in their own individual capacities.

The guarantors, on the other hand, point to the facts that, as did the notice in *Hughes*, the notices in this case refer only to Hi-Bo Farms as the debtor. Moreover, as the notice in *Hughes* failed to make any reference to the guaranties executed by the Hugheses, so in this case did the notices limit themselves to the "default under the terms and provisions of a security agreement executed by the captioned Debtor . . . ." Thus, the guarantors argue that the notices are, at best, ambiguous and, as such, constitute no notice at all insofar as they individually are concerned.

We conclude that the notices are ambiguous as a matter of law with respect to the guarantors. They refer to but a single debtor, Hi-Bo Farms, and refer only to the security agreement executed by that debtor solely. That ambiguity is to be resolved against plaintiff as the drafter of the notices.

Hi-Bo Farms, supra at 468, 398 N.W.2d at 696-97.

In *General Electric Credit Corp. v Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988), Gerald Lewis executed a guaranty in favor of General Electric Credit Corporation and covering the present and future debts of William Thompson III and Donna Ahrens. General Electric then extended a loan to Thompson and Ahrens; the loan was secured by a Mack truck tractor.

After Thompson and Ahrens had defaulted on the loan and General Electric had repossessed the Mack tractor, General Electric sent the following " 'NOTICE OF SALE OF COLLATERAL' " to Lewis:

"TO: Gerald B. Lewis
C/O Lewis Service Center
4101 West "O" Street

> Lincoln, NB 68528
>
> "PLEASE TAKE NOTICE that the following described collateral of which we have taken possession pursuant to Chattel Mortgage dated August 10, 1983 in which William Thompson III and Donna Ahrens is the Debtor and we are the Secured Party, will be sold by: . . . Private Sale on or after November 30, 1983 at 2333 Waukegan Road, Bannockburn, Illinois 60015
>
> "DESCRIPTION OF COLLATERAL: One (1) 1981 Mack Truck Tractor . . . ."

Id. at 430-31, 432 N.W.2d at 28.

In holding the notice unreasonable, this court declared:

> Apparently implicit in [*Hughes* and *Hi-Bo Farms*] is Neb. U.C.C. § 9-504 comment 5 (Reissue 1980), namely, one of the purposes of the Uniform Commercial Code notice provisions is assurance that "persons entitled to receive [notice] will have sufficient time to take appropriate steps to protect their interests." Consequently, this court has concluded that, because reasonable notice of sale is designed to give a guarantor an opportunity to protect the guarantor's interest, a notice which fails to inform the guarantor concerning an interest to protect, namely, potential liability for a deficiency after sale, is not reasonable. Therefore, to satisfy the requirement of reasonable notice, as a prerequisite concerning a guarantor's liability for a deficiency, § 9-504(3) requires that the secured party-creditor inform the guarantor of a debt concerning the guarantor's potential liability for a deficiency on sale of collateral after the principal debtor's default. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*; *First Nat. Bank & Trust Co. v. Hughes, supra*.
>
> The notice sent to Lewis, as guarantor, is deficient in view of [*Hi-Bo Farms*] and *Hughes*, because [General Electric's] notice failed to refer to Lewis' guaranty and did not inform Lewis that he, as a guarantor of the Thompson-Ahrens debt, would be liable for any deficiency after sale of the collateral. Instead, the notice referred only to Thompson and Ahrens as debtors, and to the "chattel mortgage" signed by those debtors. Since

> [General Electric's] notice to Lewis failed to inform him that [General Electric] would seek a personal deficiency judgment against Lewis in his capacity as a guarantor, the notice was unreasonable under § 9-504(3).

Lewis, supra at 433-34, 432 N.W.2d at 30.

The reasonableness of the notice to a guarantor was most recently considered in *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989). Therein, Ronald and Shirley Bennett served as corporate officers of Bennett's Gun & Cycle, Inc., and personally guaranteed that corporation's obligations to American Honda Finance Corporation. The credit which American Honda had extended to Bennett's Gun & Cycle was secured by a portion of the corporation's inventory.

After Bennett's Gun & Cycle had defaulted and American Honda had recovered its collateral, American Honda mailed identical notices of private sale to the Bennetts and to Bennett's Gun & Cycle. The only difference between the notices was the first line of the inside address. The notices stated:

> "RE: Repossessed Motorcycles and Power Equipment
> Dear Ronald and Shirley Bennett:
>
> "Pleae [sic] be advised that on or after 8:00 AM, on October 24, 1986, American Honda Finance Corporation will sell at private sale the collateral heretofore repossessed from you by American Honda Finance Corporation pursuant to the Security Agreement between you and American Honda Finance Corporation. Such collateral consist of Motorcycles and Power Equipment."

Id. at 22, 439 N.W.2d at 461.

The court concluded that the notice of private sale was sufficiently ambiguous as to be unreasonable and thus foreclose a deficiency judgment. In so ruling, it stated:

> To be reasonable, the notice must inform the guarantor of his potential liability for a deficiency on the sale of collateral after the principal debtor's default [citing *Lewis*, *Hi-Bo Farms*, and *Hughes*].
>
> Separate notices were sent to the primary debtor and the guarantors; however, the notice to the Bennetts states it was sent "pursuant to the Security Agreement between

> you and American Honda Finance Corporation." The notice made no reference to the guaranty agreement signed by the Bennetts. The notice received by the Bennetts referred only to collateral in the form of motorcycles and power equipment repossessed from "you." From the notice, it is clear the "you" referred to is Bennett's Gun & Cycle, not Ronald and Shirley Bennett. Nor does the notice give any indication that the Bennetts may be held liable for any deficiency which results from the sale. Therefore, this notice was deficient as a matter of law.

Bennett, supra at 24-25, 439 N.W.2d at 462.

The standard form notices in this case were sent to the defendant Kelleys as "Roger Kelley," "Rex Kelley," and "Florence Kelley White," without indicating whether they were being given notice in their corporate or individual capacities. This confusion is compounded by the fact the notices declare that plaintiff would "sell at private sale *your* [description of items to be sold] which was the collateral pledged pursuant to the security agreement described above . . . ." (Emphasis supplied.) The use of the term "your" before the description of the collateral to be sold exacerbates the doubt as to whether the notices were sent to the defendant Kelleys as individuals or as corporate officers. Moreover, while the standard form notices state that "[y]ou will be liable for any deficiency," the use of the term "your" before the description of the collateral makes it unclear whether plaintiff was giving notice it would seek to hold the defendant Kelleys as individuals or the corporation liable for any deficiency. Finally, the notices omit any reference to the guaranty the defendant Kelleys signed. It is these ambiguities which the defendant Kelleys argue entitle them to summary judgment under the *Hughes* line of cases.

It is to be noted, however, that in that line of cases, the notices represented the creditors' only efforts to inform the guarantors of their stake in the collateral. Consequently, the ambiguities were necessarily resolved against the creditors as the drafters of the notices, rendering the notices unreasonable.

Conversely, the plaintiff in this case made a concerted effort to ensure that the defendant Kelleys were fully informed of

their stake in collateral which was to be sold. On numerous occasions plaintiff reminded the defendant Kelleys of the guaranty which they had signed, at one point going so far as to mail each of them a copy of the document. And via correspondence, plaintiff made it clear that each of them, as guarantor, would be personally liable for any deficiency remaining after the corporation's assets were liquidated.

Plaintiff therefore urges that parol evidence should be considered in determining whether its notices contained sufficient information to apprise the defendant Kelleys that they needed to protect their interests as guarantors, and were thus reasonable; that is, the determination should be made in light of the entire conduct of the parties.

In support of this position plaintiff cites us to *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976), a case involving a lease. Therein, this court said:

> Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. [Citation omitted.] In any event, this court has ordinarily applied the parol evidence rule only in the absence of fraud, mistake, or ambiguity. [Citation omitted].
>
> A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.

Id. at 391-92, 238 N.W.2d at 462. This rule is restated and followed in *Mahoney v. May*, 207 Neb. 187, 297 N.W.2d 157 (1980), and *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980), both cases involving the construction of contracts for the sale of real estate. Like *Olds*, *Mahoney* also notes that "[p]arol evidence is generally admissible where it is offered for the purpose of explaining and showing the true nature of the transaction between the parties." *Mahoney* at 191, 297 N.W.2d at 160. And, more recently, in *Washington Heights Co. v Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987), this court noted that parol evidence is admissible to explain vague language in a written contract.

We therefore hold that whether a creditor's notice under the

provisions of § 9-504(3) sufficiently informs a guarantor of his or her status as such, of the default of the principal debtor, and of the guarantor's obligations, rights, and stake in the collateral, and is therefore reasonable, must be determined in light of the entire conduct of the parties.

Such holding compels the conclusion that there indeed exist in this case genuine issues as to material facts. Summary judgment is appropriate where there exists no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law. *First Security Sav. v. Aetna Cas. & Surety Co., ante* p. 335, 445 N.W.2d 596 (1989); *Gatzemeyer v. Neligh Township, ante* p. 329, 445 N.W.2d 593 (1989); *State Farm Fire & Cas. Co. v. Victor,* 232 Neb. 942, 442 N.W.2d 880 (1989). Consequently, the summary judgment in favor of the defendant Kelleys must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., not participating.

WHITE, J., dissenting.

The majority, by allowing parol evidence to determine whether the notices sent the guarantors pursuant to the provisions of Neb. Rev. Stat. § 9-504(3) (Reissue 1980) were reasonable under the circumstances, departs from the bright line approach to notice requirements adopted by this court in *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *General Electric Credit Corp. v. Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988); and *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989).

I would adhere to precedent and affirm the granting of summary judgment in favor of the defendant Kelleys.

FAHRNBRUCH, J., dissenting

I join in Judge White's dissent. Abolition of the bright line approach to notice requirements under Neb. Rev. Stat. § 9-504(3) (Reissue 1980) will create uncertainty where

certainty has existed, and it will encourage prolific litigation in an already overburdened judicial system.

FIRST NATIONAL BANK & TRUST OF SYRACUSE, NEBRASKA, APPELLANT, V. OTOE COUNTY, NEBRASKA, ET AL., APPELLEES.

445 N.W.2d 880

Filed September 22, 1989. No. 87-949.

1. **Taxation: Valuation: Equity: Appeal and Error.** An appeal from action by a county board of equalization is an equity action tried de novo in the district court.
2. _____: _____: _____: _____. On appeal to the Supreme Court, an equity case involving action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the Supreme Court may give weight to the fact that the trial judge observed the witnesses and accepted one version of the facts over another.
3. **Taxation: Valuation: Proof: Appeal and Error.** In a taxpayer's appeal from action of a county board of equalization, the taxpayer has the burden to prove by clear and convincing evidence that the action of the county board of equalization, in fixing or determining the value of real estate, is unauthorized by or contrary to constitutional or statutory provisions governing taxation.
4. **Taxation: Valuation: Evidence: Appeal and Error.** When a county board of equalization has determined the value of property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action a taxpayer must show more than a difference of opinion concerning the assessed value of the taxpayer's real estate.
5. **Taxation: Valuation.** Neb. Rev. Stat. § 77-112 (Reissue 1986), which specifies factors for determining actual value of real estate for tax purposes, does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine the actual value of real estate for tax purposes.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Otto H. Wellensiek for appellant.

John F. Steinheider, of Hoch & Steinheider, for appellee Otoe County.

BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

First National Bank & Trust of Syracuse, Nebraska (Bank), appeals from the district court's judgment affirming the Otoe County Board of Equalization's decision concerning the actual value of the Bank's real estate for 1986 taxation. The Bank claims that the court erred in upholding the board's valuation and excluding certain evidence.

THE NEW BANK

In September 1984, the Bank completed construction of its new banking facility in Syracuse at a cost of $1,610,873, which included land acquisition, $202,500; demolition, $23,579; general contractor, $866,550; mechanical contractor, $171,974; electrical contractor, $79,550; architectural fees, $179,550; bank fixtures, $59,970; and carpet, $27,200.

The Bank's main building has two floors above ground, with 6,588 square feet on each floor, and a basement with 6,140 square feet. The building structurally consists of a steel frame with block backup walls, brick facing, and numerous windows, and has a steel bar joist and steel deck roof with insulation and a 7.5- by 52-foot skylight. The building's interior has quarry tile floor and carpeting, wallpapered walls, a suspended acoustical tile ceiling, glass partitioned walls, an open atrium, and lighting, both recessed and spot. Offices and teller windows occupy the first and second floors. The basement contains storage areas and a large meeting room. The building is heated and cooled by a heat pump system, and has good plumbing, lighting, and electrical facilities.

Behind the Bank's main building is a separate 560-square-foot facility with a drive-up window and a remote pneumatic teller box. The facility includes a 473-square-foot canopy, and a walk-in foyer with an automatic teller machine and a walkup teller window.

The bank property also includes a heated, two-stall 576-square-foot garage, a one-stall 312-square-foot garage, and 14,468 square feet of paved parking.

APPRAISALS AND ASSESSMENT

In 1985, Otoe County hired John Charles Fritz, a licensed Nebraska real estate appraiser, to reappraise all real property in the county as of January 1, 1986. Fritz appraised the bank property at $839,790. The assessor and the equalization board reviewed Fritz' appraisal, compared Fritz' appraisal of the bank property with appraisals of similar properties, and adopted the appraisal as the county's assessment of actual value for the Bank's property.

Robert M. Ogden, a licensed Nebraska real estate appraiser hired by the Bank to determine the value of the Bank's property as of January 1, 1986, noted three accepted methods of determining the actual value of real property: the cost approach, the market approach, and the income approach.

Under the cost approach, Ogden determined the replacement cost of improvements, subtracted depreciation of the improvements, and added the value of the land. Ogden identified three types of depreciation: physical, functional, and economic depreciation. Physical depreciation results from deterioration of the improvements over time. Functional depreciation or obsolescence results from lack of market acceptance due to the obsolete nature of improvements, inability to recover the cost of unique features of a building suited to one business but unusable if the building is sold to another type of business, and decreased value caused by an improvement that is "overbuilt" in relation to the locale or community where the structure is situated. Economic depreciation results from external economic forces which depress the value of the property.

Using the Marshall Valuation Service and Residential Cost Handbook (Marshall-Swift manual) published by Marshall and Swift Publication Company, Ogden estimated the replacement cost of structures on the bank property at $1,200,000. Ogden found no physical depreciation had occurred during the 16 months between completion of the structures in September 1984 and the valuation date, January 1, 1986. However, Ogden estimated functional obsolescence to be 40 percent and stated:

> The layout of the subject property is functionally below typical due to the specialized nature of the building as a

> main bank facility. The construction of the subject property exceeds the typical steel building used for a small-town office building and is overadequate due to the bank utilizing the facility as a monument-type structure.

Ogden also relied on market research in arriving at 40 percent as the functional depreciation for the bank property:

> That figure was based on research of the market of financial institutions that was [sic] sold, and I found one particular property that I abstracted out a functional depreciation from that sale that showed a 52 percent functional depreciation. And I estimated the subject was a similar financial institution and estimated it to be 40 percent.

Ogden estimated economic depreciation at 30 percent. Economic data provided by Ogden showed retail sales in Syracuse had declined by 19 percent over the 6-year period from 1980 through 1985, and unemployment in Otoe County had increased from 5.5 percent in December 1984 to 6.7 percent in December 1985. No evidence in the record showed a relationship between retail sales or unemployment and prices in real estate sales or the decline of real estate prices in Syracuse.

Using sales of unimproved property, Ogden estimated the value of the bank site at $47,000 and, using the Marshall-Swift manual, found the value of the Bank's parking lot was $14,500. Ogden determined the value of the bank property under the cost approach was $422,000.

Under the market approach, Ogden examined 12 sales of commercial property in Nebraska and attempted to extrapolate a sale price for the bank property. Ogden's "comparable" sales ranged from the sale of an old grocery store in Syracuse, an 8,096-square-foot building which sold for $6.64 per square foot, to the sale of a bank in Lincoln, a 4,830-square-foot building which sold for $89.03 per square foot. Although several of the sales involved structures designed to house financial institutions, only 1 of the 12 properties Ogden studied was larger than the Syracuse bank facilities. In his market analysis, Ogden relied heavily on the sale of a 29,288-square-foot bank in Grand Island which sold for $28.57 per square foot, and admitted that the other properties used for

comparison would need substantial upward or downward adjustments in the sales price to compare with a hypothetical sale price for the Bank in Syracuse.

Ogden believed that the sale price of the Bank's main building would be $29 per square foot, which was multiplied by the amount of the Bank's office space above ground in the main building and produced a value of $390,000 for the Bank's property. Ogden did not consider the basement or separate structures in determining the value of the bank property under the market approach.

Ogden rejected the income approach as an accurate indicator of the bank property's value because financial institutions usually own their own building, resulting in few if any comparable rentals from which to extrapolate an income figure for capitalization.

Considering all three methods of valuation, Ogden gave most weight to the market approach for his opinion that the actual value of the Bank's property was $390,000 as of January 1, 1986.

Glen Davidson, a licensed Nebraska real estate appraiser and witness for the Bank, testified that based on his knowledge of sales in and around Syracuse over a 25-year period, the market value of the Bank's property was between $200,000 and $250,000.

Fritz testified for the county. In valuing the Bank's property, Fritz rejected the market and income approaches, since there was insufficient data from which to extrapolate a sale price or rent for the property. Thus, Fritz relied on the cost approach and determined the reproduction cost of the Bank's improvements by using a 1981 Marshall-Swift manual formerly prescribed by the Nebraska Department of Revenue. From the reproduction cost, Fritz subtracted depreciation and then added the value of the Bank's land.

The Marshall-Swift manual provides different square foot costs for reproduction, which are based on the quality of construction: excellent, good, average, and low cost. In the manual, the terms *average* and *good* refer to the quality of construction. The cost of reproduction for average construction is 24 percent less than the cost for good

construction. Although the Bank's improvements were classified as good rather than average according to the 1981 manual, Fritz used average construction cost for the Bank's improvements, since the Bank was located in a small town and had overbuilt its facilities. Regarding his use of "average" reproductive construction costs in arriving at a value for the Bank's property, Fritz stated:

> [I]t's the judgment of the appraiser which direction he cares to go when it's a fine line. And in this case, and the reason we went to the lower value is because of the opinion of Number 2, relative location and 3 desirability of functional use and the market value.

However, Fritz used prices for good construction in determining the value of similarly constructed financial institutions in Nebraska City, a larger community in Otoe County.

To determine depreciation, including physical, functional, and economic depreciation, Fritz studied sales prices of 45 to 50 commercial properties in Otoe County from 1981 to 1984, compared reconstruction costs for improvements on those properties, and, using this data, determined the depreciation rate applicable to commercial property of various ages throughout the county. Fritz applied a 5-percent depreciation rate to improvements on the Bank's property and concluded that the Bank's property had an actual value of $917,560 as of January 1, 1986.

The county granted a 10-percent "roll back" to all improvements in the county, resulting in an assessed value of $825,805 for the Bank's improvements. According to Fritz, the Bank's land had a value of $13,985. Therefore, the total assessed actual value for the Bank's property was $839,790 as of January 1, 1986.

Fritz testified that he valued all properties in the county through a uniform process and that the value of the bank property in Syracuse was equalized with the value of other property in Otoe County.

During cross-examination of Fritz, the Bank offered a copy of the 1984 Marshall-Swift manual to show that Fritz misused the manual's classifications of "good" and "average"

construction as factors affecting the value of the Bank's property. Nothing shows that the 1981 manual, used by Fritz, and the 1984 manual are substantially similar. Pursuant to the county's objection, the court excluded the 1984 manual because the document was "not the manual in force at the time" Fritz conducted his appraisal. However, on cross-examination Fritz acknowledged that his use of "good" and "average" construction for reproduction costs was based on location of the improvements, while the 1984 Marshall-Swift manual used a classification based on the quality of construction, not the site of the structure.

STANDARD OF REVIEW

"An appeal from action by a county board of equalization is an equity action tried de novo in the district court." *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 177, 403 N.W.2d 366, 372 (1987). "On appeal to the Supreme Court, an equity case involving action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court." *Id.* However, when credible evidence conflicts, the Supreme Court may give weight to the fact that the trial judge observed the witnesses and accepted one version of the facts over another. *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989); *Affiliated Foods Co-op v. County of Madison*, 229 Neb. 605, 428 N.W.2d 201 (1988). See *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988).

In a taxpayer's appeal from action of a county board of equalization, the taxpayer has the burden to prove by clear and convincing evidence that the action of the county board of equalization, in fixing or determining the value of real estate, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Co. v. Board of Equal., supra*; *Greenwood Ranch v. Morrill Cty. Bd. of Equal., supra*; *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987); *Airport Inn v. County Bd. of Equalization*, 215 Neb. 659, 340 N.W.2d 378 (1983); *Richman Gordman v. Board of Equalization*, 215 Neb.

379, 338 N.W.2d 761 (1983). See, *Spencer Holiday House v. County Bd. of Equal.*, 215 Neb. 194, 337 N.W.2d 759 (1983); Neb. Rev. Stat. § 77-1511 (Reissue 1986).

When a county board of equalization has determined the value of property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action a taxpayer must show more than a difference of opinion concerning the assessed value of the taxpayer's real estate. *Greenwood Ranch v. Morrill Cty. Bd. of Equal., supra.*

ACTUAL VALUE

Regarding assessment of property for taxation, Neb. Rev. Stat. § 77-201 (Reissue 1986) provides in part: "[R]eal property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made." Neb. Rev. Stat. § 77-112 (Reissue 1986) provides in part:

> [A]ctual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (a) Earning capacity of the property; (b) relative location; (c) desirability and functional use; (d) reproduction cost less depreciation; (e) comparison with other properties of known or recognized value; (f) market value in the ordinary course of trade; and (g) existing zoning of the property.

Section 77-112, which specifies factors for determining actual value of real estate for tax purposes, does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine the actual value of real estate for tax purposes. *Affiliated Foods Co-op v. County of Madison, supra*; *Spencer Holiday House v. County Bd. of Equal.*, 220 Neb. 607, 371 N.W.2d 286 (1985).

"In tax valuation cases actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy." *Id.* at 611, 371 N.W.2d at 288. See, also, *Richards v. Board of Equalization*, 178 Neb. 537, 134 N.W.2d

56 (1965).

We find the Bank has not shown that the equalization board improperly determined actual value for the Bank's property.

Ogden, who testified for the Bank, relied on two methods to determine the value of the Bank's property. In reference to the market approach, Ogden admitted that all but one of his "comparable" sales would require substantial adjustment to provide an accurate index for the value of the bank property in Syracuse. We believe that Ogden relied on insufficient or incomplete data in his determining the value of the Bank's property under the market approach. For that reason, Ogden's opinion on value under the market approach has little weight, if any.

Applying the cost approach, Ogden valued the Bank's land at $47,000 and used $1,200,000 for the reproduction cost of the Bank's improvements. However, Ogden used 70 percent depreciation for the Bank's improvements, which were 16 months old on January 1, 1986, in determining value under the cost method, namely, $422,000.

We accept Ogden's premises: A structure in a small community is worth less than the same structure would be in a larger community; a bank building will not retain the value of its unique features if the building is sold for use in another type of business; and economic conditions can depress the value of real estate. However, we find nothing in the record to support Ogden's applied depreciation rates of 40 percent for functional obsolescence and 30 percent for economic depreciation.

Davidson's appraisal is also unpersuasive. Although Davidson claimed that his appraisal was based on comparable (similar) sales, there is no evidence that Davidson relied on sales of property similar to the bank property.

Regarding Fritz' opinion on value, Fritz used average construction rather than good construction concerning reproduction costs in view of the Bank's location and functional obsolescence, which, according to Fritz, decreased valuation of the Bank's property by 24 percent. However, Fritz testified that the 24-percent decrease was accurate and was corroborated by valuations for improvements of similar financial institutions in Nebraska City, improvements for which values had been

determined by using the classifications of "good" and "average" construction based on the quality of construction, as reflected in the 1981 Marshall-Swift manual.

For a depreciation rate, Fritz considered the difference and relationship between construction costs and sales prices for commercial property in Otoe County and arrived at a depreciation rate of 5 percent. Fritz used this same method to determine depreciation rates for commercial property throughout Otoe County. We find that Fritz' appraisal and his opinion on value, which was adopted by the county board of equalization, is a credible expression of value for the Bank's property. Further, the district court, having heard the witnesses, chose to believe the county's witnesses and not believe the Bank's witnesses. In view of the record, we conclude that the Otoe County Board of Equalization acted properly in determining the actual value of the Bank's property.

EXCLUSION OF EXHIBIT

The Bank argues that "documents on which an expert witness relies or on which he bases his opinion should be admitted into evidence," and, therefore, the court erred in excluding the 1984 Marshall-Swift manual, which was offered to impeach Fritz' testimony by showing he misused the 1981 manual.

Nothing indicates that the 1984 manual was substantially similar to the 1981 manual used by Fritz. Without similarity to the 1981 manual, the 1984 manual supplied no basis for impeachment of Fritz. See Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)) (relevant evidence). Moreover, on cross-examination of Fritz, the Bank elicited that the manual used by Fritz did not state or recognize locality as a basis for classifying a structure as "good" or "average" construction in reference to the cost of reproduction. Whatever impeachment may have been achieved through introduction of the 1984 manual as an exhibit was accomplished by Fritz himself, when he acknowledged his misuse of the qualitative classifications of construction in reference to reproduction costs. Under the circumstances, there is no reversible error in the district court's exclusion of the 1984 Marshall-Swift manual. See Neb. Evid.

R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)) (no reversible error unless evidential ruling adversely affects a litigant's substantial right).

CONCLUSION

After a de novo review, we find that the Otoe County Board of Equalization properly determined actual value of the Bank's property. Therefore, we affirm the district court's judgment, which affirmed the decision of the Otoe County Board of Equalization.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

BOSLAUGH, J., dissenting.

The sole issue in this case is the fair market value of the appellant bank's property. Neb. Rev. Stat. § 77-201 (Reissue 1986) requires that real estate be valued at its actual value. For the purposes of taxation, the terms "actual value," "market value," and "fair market value" mean exactly the same thing. *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984).

A taxpayer may question the assessed value (actual value) of its real estate, the lack of proportionate and uniform valuation of the property, or both issues, in a proceeding before a board of equalization. *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988). In this case, the appellant questioned only the assessed value of its property. The evidence of the appellees, however, related primarily to the matter of equalization, which is not an issue in this case.

There is no substantial dispute concerning the value of the land itself. The primary controversy is over the valuation of the improvements, namely, the bank building.

The record shows that the county assessor had never been in the building, did not personally inspect or measure the property, and relied entirely upon the determination that had been made by the appraisal company. Where the assessor does not act upon his own information, or does not make a personal inspection of the property, there is no presumption that the official assessment is valid. *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966).

On cross-examination, the assessor testified as follows:

Q- I'll rephrase my question. We'll assume we have an identical building in Syracuse and Nebraska City. Both cost $600,000.00. The one in Nebraska City will sell for $500,000.00 and the one in Syracuse will sell for $200,000.00. How would you assess those two buildings for tax purposes?

A- I would say they would be assessed at $600,000.00, both areas.

Q- In both places?

A- In both places.

Q- And is that the theory you used in the taxation of the bank building in 1985 — '86 rather?

A- That is correct.

The witness John Fritz, who testified for the county and whose company performed the reappraisal for Otoe County, testified that the value of the bank property was determined by use of a cost of reconstruction less depreciation method. The critical factor in that method is the determination of the proper amount of depreciation to be allowed so that the result will be the fair market value of the property. Depreciation in this process includes not only physical deterioration, but also functional and economic obsolescence. If an inadequate depreciation allowance is made, the resulting figure will be far in excess of the fair market value of the property. Fritz allowed only 5 percent depreciation.

In this case, it seems to be generally conceded that the property was "overimproved" in the sense that it is doubtful that any commercial building in Syracuse, Nebraska, a community of approximately 1,600 persons, could ever be sold to a willing buyer in an arm's-length transaction for an amount approaching $1 million. In an effort to arrive at some further reduction in the value of the building, it appears that Fritz used "average" construction costs rather than "good," despite the fact that there seems to be no justification for using average rather than good for a modern, newly constructed building.

In *First Fed S & L Ass'n v Flint*, 415 Mich. 702, 329 N.W.2d 755 (1982), the Supreme Court of Michigan discussed the difficulty inherent in attempting to determine market value by cost of reproduction. In that case the court said:

The constitution requires that property tax assessments reflect "true cash value". The General Property Tax Act defines that term to mean "the usual selling price" of the property.

While actual and reproduction cost are some evidence of value, the constitutional and statutory standard is market-based.

The Tax Tribunal erred in adopting the hearing officer's reasoning that the value should include amounts expended for physical improvements that the hearing officer found were made to enhance the bank's "image" or "business", without regard to whether the expenditures added to the "cash" or "usual selling price" of the property. The law does not tax expenditures that merely enhance the image or business of the owner, only expenditures that add to the cash value or selling price of the property.

It can be anticipated that, if a bank puts fine hardwood and marble throughout a building, those expenditures may not enhance the selling price of the building in an amount equal to their cost. While the expenditures may add to the selling price of the building, they may not add dollar-for-dollar.

A building is sometimes worth less the day after completion of construction than its cost of construction. Ordinarily overimprovements are built by government, not by private entrepreneurs who, in theory at least, would not construct an improvement unless they thought it was worth at least what it cost to build.

The constitution and statute do not authorize a tax on the value of lumber or marble incorporated into a building, but on the market value of the completed structure and land.

We do not hold that the income approach advocated by First Federal's appraiser should govern, nor do we fault the city's appraiser or the Tax Tribunal for *considering* historical cost. Rather, we reject the notion that it is proper to include, in determining value, expenditures made, as the Tax Tribunal found, to enhance plaintiff's image and business without regard to whether they add to the selling

price of the building.

Absent more persuasive evidence, such as comparable sales, historical cost or reproduction cost can be considered in arriving at the usual selling price, but historical or reproduction cost that merely enhances image or business but not selling price is not subject to taxation.

415 Mich. at 704-07, 329 N.W.2d at 757-58.

In notes to the opinion, the court made the following statements:

If the government were to sell an overimprovement to a private person, market price rather than the cost of construction would govern for ad valorem tax purposes. If the government subsidizes a private enterprise in constructing such structures, the market value rather than cost would govern.

This issue can also arise where a private landowner, for personal reasons or simple improvidence, overbuilds for the neighborhood. He constructs a house that costs $150,000 in a neighborhood where all the other houses are worth about $75,000. In the relevant market, the house costing $150,000 may be worth $125,000 or $100,000, but not $150,000. Because it is an overimprovement for the neighborhood, the house, although brand new, should be valued at the market value, not at what it cost.

Merely because the owner may have constructed an improvement that cost more than the improvement is worth on the market should not subject the owner to a higher ad valorem tax.

Even if the structure is not an overimprovement, expenditures on it do not necessarily enhance its value dollar-for-dollar. A greenhouse, a gazebo, a tennis court, or a hot tub, while of value to the owner, do not necessarily add dollar-for-dollar to the usual selling price.

415 Mich. at 706 nn.5-6, 329 N.W.2d at 757 nn.5-6.

The appellant's evidence consisted principally of the testimony of Robert Ogden and Glen Davidson.

Davidson, a resident of Syracuse, Nebraska, and a licensed appraiser with 25 years' experience in the insurance and real estate businesses, estimated that he had sold 200 properties in

the Syracuse area during the last 10 years. He had been a tenant in the bank building, but had moved his office across the street because the upper floor of the bank was not convenient for his customers.

In Davidson's opinion, the property could not be sold for an amount in excess of $200,000 to $250,000.

Ogden is a professional real estate appraiser, whose experience included 4 years in the Lancaster County assessor's office. Ogden's opinion was that functional depreciation should be 40 percent and that the property had a value of approximately $390,000.

In the final analysis, the test is not what factors the assessor considered or failed to consider, but whether the property in question was valued for tax purposes at its actual value. *Airport Inn v. County Bd. of Equalization*, 215 Neb. 659, 340 N.W.2d 378 (1983).

My review of the record convinces me that the appellant in this case satisfied its burden of proof and established that under the Constitution and statutes of this state, and the prior decisions of this court, the board of equalization acted arbitrarily and the appellant was entitled to relief. Upon de novo review, I conclude that the assessed value of the appellant's property should have been reduced to $390,000.

CAPORALE, J., and COLWELL, D.J., Retired, join in this dissent.

MONA J. HURST, APPELLANT, V. ROBERT H. HURST, APPELLEE.
445 N.W.2d 889

Filed September 22, 1989. No. 87-1064.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified, and cause remanded with directions.

Patrick Kelly, Sarpy County Attorney, and Anthony C. Nanfito for appellant.

No appearance for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This case presents the same question as *Wilson v. Ransom, post* p. 427, 446 N.W.2d 6 (1989), which was decided today. For the reasons stated in *Wilson v. Ransom, supra,* the cause is remanded to the district court with directions to delete all provisions in the order of November 13, 1987, reciting that the order confirming registration of the Washington support order is a judgment in rem. In all other respects, the order confirming registration is affirmed.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

RHONDA L. WILSON, APPELLANT, V. PAUL E. RANSOM, APPELLEE.
446 N.W.2d 6

Filed September 22, 1989. No. 87-1065.

1. **Foreign Judgments: Child Support.** Under Neb. Rev. Stat. § 42-7,100 (Reissue 1988), the filing of the documents in the office of the clerk, as specified in the Revised Uniform Reciprocal Enforcement of Support Act, constitutes the registration of a foreign support order.
2. _____:_____. Under Neb. Rev. Stat. § 42-7,101(a) (Reissue 1988), a foreign support order that has been registered in this state generally has the same effect as a support order of this state.
3. _____: _____. At a hearing to enforce a registered foreign support order, the obligor may present matters that would be available to the obligor as defenses in an action to enforce a foreign money judgment.
4. **Foreign Judgments: Child Support: Jurisdiction.** Jurisdiction over the person or property of an obligor is not necessary to validly register a foreign support order.
5. **Foreign Judgments: Child Support: Courts.** At a confirmation hearing under Neb. Rev. Stat. § 42-7,101(b) (Reissue 1988), a district court has no authority to designate the confirmation of the registration of the foreign support order as a judgment in rem.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified, and cause remanded with directions.

Patrick Kelly, Sarpy County Attorney, and Anthony C. Nanfito for appellant.

Roger R. Holthaus for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under Neb. Rev. Stat. § 42-7,100 (Reissue 1988) to register a foreign support order under the Revised Uniform Reciprocal Enforcement of Support Act (URESA). The order sought to be registered was entered in Montana on November 1, 1979, and required the appellee, Paul E. Ransom, to pay $75 per month per child to the appellant, Rhonda L. Wilson, for the support of their three minor children.

Pursuant to the act, copies of the foreign support order were filed in the office of the clerk of the district court for Sarpy County, Nebraska, on September 8, 1987, together with the other documents required by the act. § 42-7,100(a). The act provides:

> Upon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It shall have the same effect and shall be subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

Neb. Rev. Stat. § 42-7,101(a) (Reissue 1988).

The act further provides, in § 42-7,101(c):

> At the hearing to enforce the registered support order, the obligor may present only matters that would be available to the obligor as defenses in an action to enforce a foreign money judgment. If the obligor shows to the court that an appeal from the order is pending, or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated, upon satisfactory proof that the obligor has furnished security

> for payment of the support ordered as required by the rendering state. If the obligor shows to the court any ground upon which enforcement of a support order of this state may be stayed, the court shall stay enforcement of the order for an appropriate period if the obligor furnishes the same security for payment of the support ordered that is required for a support order of this state.

The appellee, although notified as provided in the act, did not petition the trial court to vacate the registration or for other relief, so on November 10, 1987, the trial court entered an order confirming the registration. The order, however, was entitled "Judgment In Rem," and recited:

> This Order confirming the registration is a judgment in rem, and not a judgment in personam.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED the Decree of Dissolution is hereby confirmed as a registered judgment of this Court pursuant to Neb. Rev. Stat. § 42-796 [et] seq.
>
> IT IS FURTHER ORDERED this is a judgment in rem and not a judgment in personam.

The trial court overruled the appellant's motion for a new trial "for the reason that the pleadings indicate that there are no contacts between [Paul Ransom] and the State of Nebraska, that [Paul Ransom] has never been personally served, and that any statutary [sic] provision indicating the registration should be in personum [sic] is constitutionally defective."

Rhonda Wilson, the obligee and respondent in the Montana proceeding, has appealed to this court and contends that the trial court erred in designating the registration of the Montana support order as a judgment in rem.

The act provides, in § 42-7,101(c), that at the hearing to enforce a registered support order, the obligor may present matters that would be available to the obligor as defenses in an action to enforce a foreign money judgment.

In *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977), the court considered whether jurisdiction over the person or property of a defendant-obligor is necessary in order to register a foreign support order under URESA. The Pinners had been divorced in Florida in 1969, and the defendant

husband was ordered to pay $450 per month alimony. In May 1976, the wife registered the Florida judgment in North Carolina. Her affidavit stated that she resided in North Carolina, that she believed defendant resided in Pennsylvania, and that defendant was $31,050 in arrears in alimony payments. Notice of registration was sent to the defendant. He petitioned that the registration be vacated on the grounds that the court lacked jurisdiction over the subject matter or over the person or property of the defendant, that service of process was defective, and that the Florida judgment was void because that court lacked jurisdiction over the parties and the subject matter. After a hearing, the trial court concluded that the Florida judgment had been properly registered as a foreign judgment.

The statutes involved were substantially similar to Nebraska's § 42-7,101. The North Carolina court held first that the URESA registration provisions establish a two-step procedure: "(1) registration of the order, and if required, a hearing on whether to vacate the registration or grant the 'obligor' other relief; and (2) enforcement of the order." *Pinner v. Pinner, supra* at 206, 234 S.E.2d at 635. The court concluded that the obligee had the option to merely register the order or to register and enforce it simultaneously.

The court then considered whether jurisdiction over the person or property of the obligor was necessary for a valid registration.

> Jurisdiction is the power of the court to decide a matter in controversy, and presupposes the existence of a duly constituted court with control over the subject matter and the parties. . . . A judgment or order against a defendant who is not in court in some way sanctioned by law is void for want of jurisdiction. . . . In the present case we are not concerned with the limited judicial *power* of the Clerk of Court to render judgments or issue orders. . . . Rather we are here concerned with the *duty* of the clerk to register a foreign judgment properly presented under [URESA].

(Citations omitted.) *Pinner v. Pinner, supra* at 206-07, 234 S.E.2d at 636. The court held that jurisdiction over the person or property of the obligor was unnecessary for registration of a foreign support order. See, also, *Fleming v. Fleming,* 49

N.C. App. 345, 271 S.E.2d 584 (1980).

> The mere registration of a foreign support order presented by the obligee under [URESA] is a ministerial duty of the clerk. By that act no court or agency of the state is purporting to exercise power over the obligor or his property. Registration does not prejudice any rights of the obligor; it merely changes the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina. Once the order is so treated the obligee or the obligor may request modifications in the order, and when the obligee attempts to enforce the order, the court must determine whether jurisdiction exists over the person or property of the obligor and what amount, if any, is in arrears.

Pinner v. Pinner, supra at 207, 234 S.E.2d at 636. Finally, the court determined that language in the confirmation order purporting to find personal jurisdiction was superfluous and would not bind the defendant in subsequent enforcement proceedings.

The *Pinner* court's analysis has been adopted in other jurisdictions. In *Lagerwey v. Lagerwey*, 681 P.2d 309 (Alaska 1984), the parties were divorced in Washington in 1978, and the husband was ordered to pay $250 per month for the support of two minor children. The husband continued to reside in Washington. The wife moved to Alaska and, in August 1982, filed a motion to obtain an Alaska judgment for arrears on the Washington divorce decree. The motion was denied on the ground that the Alaska court lacked personal jurisdiction over the husband.

The court held, first, that to the extent that the relief sought by the wife was for an adjudication to determine the amount of arrears owed in Washington, lack of personal jurisdiction was no bar to the action. Second, under URESA, "an obligee can *register* a judgment in Alaska, regardless of the obligor's presence in this state and regardless of whether the obligor has sufficient minimum contacts with this state to satisfy due process." *Lagerwey v. Lagerwey, supra* at 311 (citing *Fleming v. Fleming, supra*, and *Pinner v. Pinner, supra*).

Third, the court distinguished between registration and

enforcement of a support order. The court determined that the judgment should have been registered, but that to the extent that the wife initiated the proceeding to invoke the assistance of the Washington courts in collecting the arrears, her complaint should have been forwarded to Washington under another URESA provision.

In considering whether the lower court properly declined to issue a judgment for arrears, the court stated:

> In this case, the question is whether an Alaska court is authorized to issue a judgment for arrears on a properly registered foreign support order, without personal jurisdiction. If the foreign support order were retrospectively modifiable as to the amount due in the state of its issuance, then it would be improper for a court of this state to issue a judgment for arrears without first obtaining personal jurisdiction over the obligor and affording him an opportunity to litigate the propriety of such a modification. However, when the foreign support order is a final judgment entitled to full faith and credit in this state and the obligor has been properly notified so as to satisfy the due process clause, personal jurisdiction over the obligor is not a prerequisite to the issuance of a judgment for arrears. *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). Given a final and presumptively non-modifiable support order, issuance of a judgment for arrears is an exercise in arithmetic, nothing more. It is when the obligee attempts to execute on property, attach wages, or otherwise *enforce* the judgment that the obligor's interests are affected. At that stage, a registering state can exercise *in rem* jurisdiction over the obligor's property in the state without any personal jurisdiction, so long as the obligor/judgment debtor is given an opportunity to respond by showing the judgment has been satisfied. [Citations omitted.]

Lagerwey v. Lagerwey, supra at 312-13.

In *Gingold v. Gingold*, 161 Cal. App. 3d 1177, 208 Cal. Rptr. 123 (1984), the court of appeal held that lack of jurisdiction over the obligor was not a proper basis upon which to vacate the registration of a foreign support order. The parties in *Gingold*

were divorced in New York in 1968. The husband was ordered to pay $800 per month alimony and $300 per month for the support of the parties' minor child. In 1981, the wife sought to register the New York decree in California, alleging that support of $88,000 was due as of July 1981. The husband petitioned the court to vacate the registration, alleging, in part, that he was not subject to the jurisdiction of the court because there existed no basis for California to exercise personal, in rem, or quasi in rem jurisdiction with respect to him or his property. The trial court vacated the registration on these grounds.

In reversing, the court of appeal held that "it is not necessary for a California court to have jurisdiction over the person or property of an obligor in order to validly register a foreign support order pursuant to RURESA." *Gingold v. Gingold, supra* at 1185, 208 Cal. Rptr. at 127.

Finally, in *In re Davanis v. Davanis*, 132 Wis. 2d 318, 392 N.W.2d 108 (1986), the parties were married in Wisconsin in 1970 and moved to California in 1971. They were divorced in California in 1979; the wife and child moved back to Wisconsin while the divorce was pending. In 1983, the wife registered the California divorce judgment in Wisconsin pursuant to URESA. The husband filed no response to the registration procedure and made no appearance.

In 1984, however, the Wisconsin court signed an order requiring the husband to show cause why an order increasing the monthly child support payments should not be entered. The trial court later issued a written decision holding that it was without the personal jurisdiction over the husband necessary to proceed in the matter. On appeal, the wife claimed that the husband waived any defense based on lack of personal jurisdiction because he failed to object to jurisdiction in the registration proceeding.

The Wisconsin Court of Appeals adopted the reasoning of *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977), holding that jurisdiction over the person is not necessary for registration of a foreign support order pursuant to URESA when no affirmative relief is requested.

Mere registration without further action does not subject

> the obligor to any peril which would motivate a reasonable person to come forward and object to the court's jurisdiction. We therefore hold that an obligor may raise a challenge to the court's exercise of personal jurisdiction at a subsequent enforcement proceeding.

In re Davanis v. Davanis, supra at 327, 392 N.W.2d at 112.

The trial court was in error in designating the registration of the Montana support order a judgment in rem. Under the act, the filing of the documents specified in § 42-7,100 constitutes the registration of the foreign support order. The confirmation order merely establishes that the registration procedure was proper and that the obligor has not petitioned the court to vacate the registration or for other relief.

At a hearing to enforce the order, the obligor may present any defense that would be available in an action to enforce a foreign money judgment.

The cause is remanded to the district court with directions to delete all provisions in the order of November 10, 1987, reciting that the order confirming registration of the Montana support order is a judgment in rem. In all other respects, the order confirming registration is affirmed.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

FIRST NATIONAL BANK AND TRUST COMPANY OF FREMONT, NEBRASKA, APPELLEE V. ROBERT D. MILLER, APPELLANT.

446 N.W.2d 11

Filed September 22, 1989. Nos. 87-1075, 87-1076.

Appeals from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge, and from the District Court for Dodge County, MARK J. FUHRMAN, Judge. Judgments of District Court affirmed.

Richard L. Kuhlman for appellant.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf & Boggy, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

The defendant has appealed an adverse judgment in a forcible entry and detainer action arising out of an oral lease of premises and an action for declaratory judgment for rescission of a contract to purchase the same real estate. The cases, although briefed separately, have been consolidated on the court's own motion for the purpose of this opinion. We affirm.

The defendant signed an agreement to purchase certain premises in Dodge County from the plaintiff. He made a downpayment of $1,500 and was to pay the balance of the purchase price of $40,000 in cash or certified check on closing day. The parties orally agreed that the defendant could lease the property for $350 per month until the purchase closed.

The defendant was consistently late with the rental payments. Finally, the plaintiff gave defendant a 3-day notice to quit the premises and on June 19, 1987, filed a complaint in forcible entry and detainer in the county court. On the same day, plaintiff filed an action in the district court for declaratory judgment, seeking rescission of the purchase contract because of a breach by the defendant in failing to pay the balance of the purchase price. The county court granted plaintiff a writ of restitution and a money judgment for back rental. Defendant appealed to the district court.

The district court considered the appeal from the county court and the petition for declaratory judgment at the same time. It affirmed the action of the county court and entered judgment for the plaintiff on its petition for restitution. The basis upon which rescission was granted was that at the time of closing, rather than tendering cash, defendant tendered a sight draft in the sum then due of $40,700 drawn against Common Title Bond and Trust. This was presented for payment, and Common Title returned a bill of exchange for $40,700, which

has not been paid. The Federal Reserve bank has informed the plaintiff that it has had inquiries from several banks attempting to collect on Common Title bills of exchange and that it will not pay those documents. In other words, the instruments tendered by defendant seem to be worthless, and defendant has never complied with the terms of the purchase agreement to pay the balance of the purchase price. It requires no citation of authority to justify the rescission of a purchase contract where the purchaser utterly fails and refuses to pay the purchase price when due.

Defendant's theory as to why the judgment for restitution in the forcible detainer action should be reversed is equally novel and frivolous. He contends that because he posted a supersedeas bond to cover the rental payment during the term of appeal, it constitutes acceptance of rental payments and amounts to a waiver by the plaintiff of the June breach of the oral lease. However, a supersedeas bond " 'does not reverse, annul, or undo what has already been done, or impair the force, or pass on the merits, of the judgment, order, or decision of the trial court . . . .' " *Kleeb v. Kleeb*, 213 Neb. 537, 540, 330 N.W.2d 484, 486 (1983). The bond simply preserves the status of the parties as of the time of judgment.

The judgments of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SYLVESTER FRANK PETTIT, APPELLANT.

445 N.W.2d 890

Filed September 22, 1989. No. 88-492.

1. **Homicide: Words and Phrases.** A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305(1) (Reissue 1985).
2. **Criminal Law.** There are no common-law crimes in Nebraska.
3. **Criminal Law: Legislature: Statutes.** Within constitutional boundaries, the

Legislature is empowered to define a crime and punish a person's conduct expressly declared to be criminal.

4. **Criminal Law: Statutes: Intent: Words and Phrases.** The meaning of words or phrases used in reference to common-law crimes may be helpful in determining the meaning, intent, or effect of a statute which does not contain an express definition of terms in the statute.
5. **Homicide: Words and Phrases.** Neb. Rev. Stat. § 28-305(1) (Reissue 1985) establishes and distinguishes the two categories of manslaughter: an unlawful killing, without malice, "upon a sudden quarrel," which may be characterized as voluntary manslaughter, and an unlawful but unintentional killing, without malice, as the result of the defendant's commission of an unlawful act, which may be characterized as involuntary manslaughter.
6. _____: _____. As used in Neb. Rev. Stat. § 28-305(1) (Reissue 1985), the phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
7. _____: _____. In relation to manslaughter, a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
8. **Convictions: Homicide: Proof: Intent.** To sustain a conviction for voluntary manslaughter under Neb. Rev. Stat. § 28-305(1) (Reissue 1985), that is, a conviction for killing another, without malice, "upon a sudden quarrel," the State, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another.
9. **Homicide: Intent: Words and Phrases.** "Accident" is not a defense to the crime of voluntary manslaughter under Neb. Rev. Stat. § 28-305(1) (Reissue 1985), but does relate to intent to kill, which is an element of the crime of manslaughter committed "upon a sudden quarrel."
10. **Homicide: Intent: Jury Instructions.** If a court instructs the jury that intent to kill is an element of voluntary manslaughter committed "upon a sudden quarrel," and otherwise sufficiently defines *intent* or *intentional* relative to the defendant's conduct, the trial court is not required to give a separate instruction on the theory of accident pertaining to the homicide which is the subject of the manslaughter charge against the defendant.

Appeal from the District Court for Blaine County: RONALD D. OLBERDING, Judge. Reversed and remanded for a new trial.

John O. Sennett and Brad Roth, of Sennett & Roth, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

A jury found Sylvester "Frank" Pettit guilty of manslaughter in the death of his wife, Pandora Pettit. Neb. Rev. Stat. § 28-305(1) (Reissue 1985) provides: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." The court sentenced Pettit to imprisonment for 4 to 12 years.

Frank Pettit claims that the district court erred by overruling Pettit's motion for directed verdict at the conclusion of evidence and in refusing to instruct on "accident" regarding Pandora Pettit's death. Frank Pettit also contends that the district court committed reversible error by allowing amendment of the information initially filed, admitting evidence over Pettit's relevance objections (photographs taken in conjunction with the autopsy on Pandora Pettit, rifle ammunition found at the scene of the fatality, Pettit's .44-caliber pistol, and testimony concerning Pettit's physical appearance), and imposing an excessive sentence.

BACKGROUND FOR THE FATALITY

Frank and Pandora Pettit were married in July 1982. Frank Pettit drank alcohol to excess and frequently changed jobs. On New Year's Eve for 1986, Frank Pettit and his cousin, with whom Pettit had grown up, attended a dance. During the course of that evening, Frank's cousin committed suicide, apparently by gunshot. Later, Frank tried to take his own life, but his suicide weapon, a gun, misfired. In August 1986, Frank and Pandora Pettit began working for the Shinn Turkey Ranch, where Frank mixed feed for turkeys and loaded live turkeys for shipment on trucks. Pandora took care of brooder turkeys and helped Frank load turkeys for shipment. The couple lived with Pandora's children from a previous marriage, namely, Scott, age 13, and Shelly, age 12, in a house provided by and located on the Shinn ranch. The Pettit home did not have a telephone. According to Doug Shinn, Pettits' employer, Frank Pettit did not exhibit a drinking problem during employment by Shinn.

Although Shinn never saw Frank Pettit with a firearm, Frank owned two guns, a .22-250 caliber Remington Model

788, a high velocity bolt-action rifle; and a .44-caliber, black powder, cap-and-ball pistol. Donald Roberts, who was Pettits' neighbor for 5 months before Pandora's death, never observed Frank Pettit intoxicated or saw Frank Pettit act belligerently toward, or otherwise threaten, Pandora. Although Pettits had difficulty in paying their debts and sometimes argued about their financial condition, Frank Pettit never struck Pandora during their arguments.

On January 15, 1987, an extremely cold day, Frank and Pandora were working on the Shinn ranch. Around 3 p.m., Pettits and other Shinn employees began loading turkeys for shipment, work which continued until 9:30 p.m., when Pettits received their paychecks. Pandora, who received the checks for Pettits, lost the checks, which irritated Frank because the cold and dark hindered finding the checks among the turkey feathers at the loading site. After a 10-minute search, Pettits found their checks and, after dismantling the loading equipment, returned to their home around 10 p.m. Pandora took a warm bath. Frank, who was "pretty well wound up," began drinking cherry vodka and scotch while listening to music. Later, Pettits argued about Frank's drinking. After four or five drinks, Frank decided to drive to town for more liquor. Pandora accompanied Frank, who took his .44-caliber pistol on the trip to town. En route, Pettits' car ran out of gas, and the couple started to walk across a field on the return to their home. Pettit gave his insulated nylon jacket to Pandora and attempted to carry her across a rough field, but kept falling down. When Pettits finally reached their home, Frank passed out in the front yard. Pandora went into the house and returned outside with Scott and Shelly to assist in taking Frank into the house. While Pandora and the children were helping Frank enter the house, he awoke and pointed the .44 pistol at "something" in nearby bushes, only to discover that the "something" was Hubert, the family's dog. Pettits and the children entered the house. Scott and Shelly went to bed, Pandora went somewhere within the house, and Frank entered Pettits' 9- by 11-foot bedroom through its only access, a door at the room's southwest corner. A bed was located in the northwest corner of the room opposite the doorway. A dresser stood against the bedroom's east wall.

THE SHOOTING

According to Frank Pettit, he entered the bedroom with the intention to commit suicide, put the pistol in a dresser drawer, started his tape player for music, and took his rifle from behind the bedroom door. Then Frank Pettit sat on the edge of the bed and "jacked a shell in the rifle," that is, Pettit operated the bolt-action to deliver a live round from the cartridge clip or magazine to the breech and cock the rifle's hammer for firing. The cartridge clip or magazine fits into a magazine floor plate, which is located immediately ahead of the rifle's trigger guard. After he had armed the rifle, Pettit placed the butt of the rifle on the floor between his legs with the rifle's muzzle near his head. At that point, Pandora entered the bedroom and started arguing with Frank about his obvious and present effort to commit suicide. Frank pushed Pandora from the bedroom and again sat on the side of the bed, placing the butt of the rifle on the floor with the rifle's muzzle under his chin. Pandora reentered the room, grabbed the rifle from Frank, and threw it over Frank's right shoulder as she exclaimed: "Frank, don't. Frank, don't. Frank, stop. Stop, Frank. Stop, Frank." The hurled rifle landed behind Frank on the bed. Still seated on the edge of the bed, Frank retrieved the rifle and, with his knees bent and his feet on the floor, lay back on the bed. The rifle's barrel pointed generally to the left of Frank Pettit as the rifle lay across Frank's legs at his knees. The couple continued to argue about Frank's prospective suicide. Pandora finally convinced Frank to forgo suicide and began to take off the nylon jacket she was wearing. According to Frank Pettit:

> [Pandora] told me finally that if, tomorrow, I still wanted to commit suicide, that she wouldn't want to stand in my way, and convinced me to wait until tomorrow, and at that point, she started to take off her coat and stuff, and I went ahead and started to sit up and pick up the rifle, and at the same time I went to pull the clip out of the rifle, and that's when it went off.

Frank caught Pandora as she fell, placed her on the floor with her head toward the bedroom's west wall, and tried to comfort her.

Ten to 15 seconds after Scott had heard Pandora exclaim,

"Stop, Frank," or "Don't, Frank," he heard a shot and thought that Frank Pettit had committed suicide. Shelly and Scott went to the Pettit bedroom and found Pandora lying on the floor with Frank Pettit at her side. Frank told the children to go next door to the Roberts residence and call an ambulance. After doing so, Scott returned to the Pettit bedroom, where Pandora, shortly before she died, said to Scott: "Don't worry. I'm not going to die. It was an accident. I love you."

Roberts, the neighbor, came to the Pettit house and found Pandora lying on the bedroom floor with Frank's jacket wrapped around her left arm. Roberts picked up the rifle from the floor at Pandora's left side, leaned the rifle against the bedroom wall, and observed Frank Pettit, kneeling at Pandora's right side and trying to stanch the flow of Pandora's blood by inserting a piece of plastic into the bullet wound in Pandora's chest. Pandora was conscious but was experiencing "pretty bad pain." Although Pandora stopped breathing, Frank tried, without avail, to administer mouth-to-mouth resuscitation to Pandora, who was dead when the ambulance appeared.

When police arrived, they found the rifle leaning against the bedroom wall. There was an expended cartridge in the rifle's chamber, a live round in the rifle's clip, and an unspent rifle cartridge on the floor near the corner of the dresser where Frank Pettit had placed his pistol. Police found rifle ammunition in the dresser drawer. Nothing indicated a scuffle or struggle in the Pettit bedroom. The police believed that Frank Pettit was sober. Pandora Pettit's body lay adjacent to the bed with her arms extended westward over her head.

FRANK PETTIT'S TRIAL

The Information.

In the information on which the case was tried, the State, basically in the language of § 28-305(1), charged that Frank Pettit did "unlawfully and feloneously [sic], kill another, to-wit: one Pandora Pettit, without malice, either upon a sudden quarrel, or cause the death of another, to-wit: one Pandora Pettit, unintentionally while in the commission of an unlawful act . . . ."

The "unlawful act" alleged in the information was criminal assault in the third degree, a violation of Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1985), which states: "A person commits the offense of assault in the third degree if he [or she] . . . [t]hreatens another in a menacing manner."

Evidence.

During his testimony, Frank Pettit acknowledged that he and Pandora had been quarreling about his suicidal effort just before the shooting and that during the argument or quarrel, Pandora had convinced Frank not to commit suicide. Frank Pettit did not recall whether he had released the safety on the rifle that evening as a step toward suicide and could not recollect how many live rounds were in the rifle's clip or magazine when the weapon discharged. However, Frank Pettit was adamant that he never aimed the rifle at Pandora Pettit, pointed the weapon at Pandora "with the intention to hurt her," had his finger on the rifle's trigger when the weapon discharged, or intended to shoot Pandora. Pettit asserted that the shooting was "unintentional" and "accidental" because "I was raising the gun with one hand at the same time that I was sitting up, and that I was also pulling the clip out or attempting to" when the rifle discharged.

A forensic firearms specialist negated malfunction of Frank Pettit's rifle. The rifle had a properly functioning safety located on the stock behind the bolt. If the safety is engaged to prevent discharge of the rifle, the safety could be released by motion in the direction of the muzzle, such as thumb pressure exerted on the safety. When pressure of $3^1/_2$ to $3^3/_4$ pounds was applied to the rifle's trigger, the cocked hammer was released and drove the firing pin against the cartridge in the weapon's breech. Such trigger action was in accordance with the manufacturer's standards and was otherwise acceptable for Frank Pettit's rifle, which showed no susceptibility for accidental discharge through "shocks" or "jolts" to the rifle. Examinations disclosed no gunpowder residue on Pandora's body and indicated that the rifle's muzzle was at least 15 inches from the nylon jacket when the rifle fired. The bullet hole in the jacket did not align with the wound in Pandora's chest unless the jacket were elevated somewhat on Pandora's torso, indicating that when the bullet struck Pandora, she had raised her arms

above her head or had elevated her arms while she was removing the jacket.

An autopsy established that Pandora's death was caused by a bullet's destruction of the upper lobe of her right lung and that there were no bruises or contusions on Pandora's body except for the bullet wound. According to the pathologist, "The bullet entered the body in a perpendicular plane. If one assumes a body as being upright and the bullet goes almost straight in in this fashion." On entry into Pandora's body, the bullet struck her third and fourth ribs, which may have deflected the bullet from a straight path and caused the bullet to fragmentate. Bone fragments from her shattered ribs punctured Pandora's lung. However, the pathologist acknowledged that the bullet's perpendicular path to Pandora's torso could mean that the bullet was fired at a slightly upward angle if Pandora happened to be bending at the waist when the bullet entered her body. The pathologist concluded:

> There is no way that — from the autopsy, that we can tell what position Mrs. Pettit was in when this bullet struck her, so whether she was vertical or horizontal, I can't tell, but I can tell that from that plane of her body, the bullet entered in a perpendicular fashion to whatever plane her body was in.

As a witness for Pettit, a psychiatrist testified without objection that, on the night Pandora Pettit was shot, Frank Pettit was suicidal and "suffered the disease of alcoholism to a severe degree" and further testified that Frank Pettit "would not willfully . . . or intentionally harm or kill Pandora."

At the close of all the evidence, the court overruled Pettit's motion for a directed verdict or dismissal of the charges against Pettit.

Instructions.

The court denied Pettit's requested instruction:

> If the shot which caused the death of Pandora Pettit was wholly accidental so far as the Defendant was concerned and not while the Defendant was in the commission of an unlawful act, your verdict should be not guilty. To warrant a verdict of guilty the State must satisfy you beyond a reasonable doubt that the weapon, at the time and place in question was not accidentally discharged

> or if accidentally discharged that the Defendant was then engaged in an unlawful act directly connected therewith.

The court instructed the jury that to convict Frank Pettit of manslaughter, the State was required to prove beyond a reasonable doubt that Frank Pettit "killed Pandora Pettit [and that] he did so without malice, either upon a sudden quarrel, or unintentionally, while he was in the commission of some unlawful act." Regarding the "unlawful act" mentioned in the foregoing instruction, the court informed the jury: "An assault in the third degree is, under the Nebraska Criminal Code, an unlawful act within the meaning of the manslaughter statute. 'Assault in the Third Degree' is committed by threatening another person in a menacing manner." The court gave an additional instruction in the language of § 28-305(1): "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Concerning the manslaughter charge against Frank Pettit for Pandora Pettit's death "upon a sudden quarrel," the court gave no instruction relative to "accident" or intent to kill as an element of manslaughter based "upon a sudden quarrel."

In his summation, the prosecutor noted the absence of an instruction on "accident" and argued:

> What is — what's the defense that has been offered to you? Isn't the defense based on the evidence and argument from counsel that this was an accident? The statute doesn't say it's not the crime of manslaughter if it is an accident, does it? If you accept as truth everything that the defendant told you on the witness stand, he is guilty of manslaughter because this took place under or upon — upon is the language of the statute — that this took place upon a sudden quarrel. You don't find accident as a defense in the statute . . . .

The jury returned a verdict that Frank Pettit was guilty of manslaughter as charged.

NEBRASKA'S MANSLAUGHTER STATUTE AND DUE PROCESS CONSIDERATIONS

Readily apparent in the Nebraska manslaughter statute,

§ 28-305(1), is the definition of a criminal homicide, expressed in an inclusive disjunction, namely: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, *or* causes the death of another unintentionally while in the commission of an unlawful act." (Emphasis supplied.)

Clearly, the second of the statutory alternatives in § 28-305(1) prohibits a person's killing another "unintentionally while in the commission of an unlawful act," but the first of the manslaughter statute's alternatives is silent concerning intent to kill as an element of manslaughter "upon a sudden quarrel." One construction of § 28-305(1) might be that since the situations for manslaughter are expressed in the alternative or inclusive disjunction, the explicit statement of "unintentionally" killing another, expressed in the second of the alternative situations for manslaughter, means that the first of the statutory alternatives requires the element of an intentional killing as opposed to the unintentional killing in the second of the alternative situations for manslaughter. However, if the first of the alternative situations expressed in § 28-305(1) does not require an intentional killing as an element of manslaughter, absence of criminal intent results in strict responsibility for a killing "upon a sudden quarrel."

Although Pettit concedes that intent to kill is not required for violation of the second of the alternatives stated in § 28-305(1), he contends that intent to kill is a requisite element for manslaughter "upon a sudden quarrel." On the other hand, the State argues, in essence, that intent to kill is not an element of manslaughter "upon a sudden quarrel," that is, anyone causing another's death "upon a sudden quarrel" is strictly liable for the offense of manslaughter. Therefore, we must determine whether manslaughter "upon a sudden quarrel" requires the element of intent to kill or whether strict accountability for another's death "upon a sudden quarrel" eliminates intent to kill as an element of the felony designated as "manslaughter."

In determining whether criminal intent is an element of manslaughter "upon a sudden quarrel," we bear in mind the general rule that "criminal statutes are interpreted as requiring criminal intent, and this is particularly true in situations in

which the offense involved is a felony." *United States v. O'Brien*, 686 F.2d 850, 853 (10th Cir. 1982). As the U.S. Supreme Court has observed:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Morissette v. United States, 342 U.S. 246, 250-51, 72 S. Ct. 240, 96 L. Ed. 288 (1952). See, also, *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978): "Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality, [citation omitted], intent generally remains an indispensable element of a criminal offense."

The fact that a statutory definition of a crime may not include reference to the accused's mental state does not necessarily negate intent ("mens rea") as an element for a crime.

> [T]he holding in *Morissette* can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretive presumption that *mens rea* is required. "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them." [Citation omitted.]

> While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements [citation omitted], the limited circumstances in which Congress has created and this Court has recognized such offenses [citations omitted] attest to their generally disfavored status.

United States v. United States Gypsum Co., supra at 438 U.S. at 437-38 (quoting *Morissette v. United States, supra*). See, also, *United States v. Anton*, 683 F.2d 1011, 1017 (7th Cir. 1982): mere omission of intent as an element of a felony does not justify dispensing with intent as an element of the crime because " ' "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." ' " (Quoting *United States v. United States Gypsum Co., supra*); *State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986): "Strict liability offenses are the exception rather than the rule and will only be found where there is a clear legislative intent not to require any degree of mens rea"; *State v. Jones,* 242 Kan. 385, 391-92, 748 P.2d 839, 845 (1988):

> When an act is prohibited and made punishable by statute, the statute is to be construed in the light of the common law. The existence of a criminal intent is regarded as essential even though the terms of the statute do not require it, unless it clearly appears that the legislature intended to make the act criminal without regard to the intent with which it was done.

Violation of some criminal statutes may occur without a defendant's criminal intent, if such type of statutes

> omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where the conviction does not gravely besmirch, where the statutory crime is not taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960). We note that the penalty for manslaughter is a maximum sentence of 20 years' imprisonment, a $25,000 fine, or both such imprisonment and fine and that the minimum penalty for manslaughter is 1 year's imprisonment. See § 28-305(2) and Neb. Rev. Stat. § 28-105(1) (Reissue 1985). Thus, when the penalty for violation of a statute is severe or conviction for violation of the statute may irreparably damage the defendant's reputation, elimination of criminal intent as an element necessary for violation of a statute may violate due process. See *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985).

With that backdrop, we proceed to analyze the crime of manslaughter in Nebraska.

MANSLAUGHTER AT COMMON LAW

As this court observed in *State v. Hutter*, 145 Neb. 798, 801-02, 18 N.W.2d 203, 206-07 (1945):

> An historical approach seems necessary to secure an adequate discussion of the subject. There were no degrees of murder or manslaughter at common law. All criminal homicide was either murder or manslaughter, but the latter was included in the former as a constituent element thereof, or it might exist as a distinct offense where there was no malice aforethought. At common law, murder is the unlawful killing of a person with malice aforethought, either express or implied, and manslaughter is the unlawful killing of another without malice express or implied. Manslaughter differs from murder in the want of malice, a condition of the blood or mind at the time of the act. This distinction is the only one that the accumulated wisdom of the common law deemed it advisable to make.

Hence, at common law, two types of criminal homicide existed: murder and manslaughter. Under common law, murder was the unlawful killing of another human being with malice aforethought and was punishable by death, while manslaughter was the unlawful killing of another without malice and carried a penalty less than death. Consequently, the element of malice, the intention to do a wrongful act without just cause or excuse, distinguished murder from manslaughter

at common law. 2 W. LaFave & A. Scott, Substantive Criminal Law §§ 7.1(a), 7.9, and 7.10(h) (1986). Accordingly, under common law, malice was necessary for murder, and the absence of malice was necessary for manslaughter.

Although the common-law crime of murder was accompanied by an intent to kill and was, therefore, characterized as a voluntary homicide, courts began to recognize an intentional homicide committed under extenuating circumstances which mitigate, but do not justify or excuse, the killing, that is, adequate legal provocation which causes a reasonable individual to lose his or her normal self-control, thereby reducing the homicide from murder to "voluntary" manslaughter. 2 W. LaFave & A. Scott, *supra*, § 7.10.

> The usual type of voluntary manslaughter involves the intentional killing of another while under the influence of a reasonably-induced emotional disturbance (in earlier terminology, while in a "heat of passion") causing a temporary loss of normal self-control. Except for this reasonable emotional condition, the intentional killing would be murder.

2 W. LaFave & A. Scott, *supra*, § 7.10(a) at 254.

> Voluntary manslaughter is an intentional killing in the heat of passion as a result of severe provocation. As a concession to human frailty, a killing, which would otherwise constitute murder, is mitigated to voluntary manslaughter.
>
> Although, given severe provocation, the impairment of a defendant's capacity for self-control may be substantial, the offense is only mitigated, not excused; if there were no punishment at all, there would be no incentive for an enraged person to make an effort to control his emotions. It must be remembered that this is not a killing in self-defense; it is not "necessary" for the provoker to be killed. The provoker is not completely innocent of wrongdoing, but the law cannot tolerate the taking of his life.

2 C. Torcia, Wharton's Criminal Law § 153 at 236-38 (14th ed. 1979).

In the Model Penal Code § 210.3(b) at 43 (1962), criminal homicide constitutes manslaughter when "a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."

As noted in the Model Penal Code, murder and manslaughter were distinguished at common law because "homicide, even if intentional, was said to be without malice and hence manslaughter if committed in the heat of passion upon adequate provocation." Model Penal Code, § 210.3, comment 1 at 44 (1962).

Concerning provocation which reduced the criminal homicide from murder to manslaughter,

> [p]rovocation nevertheless survived as a rule of mitigation for intentional homicides committed in certain extenuating circumstances . . . . A sudden rage, however engendered, does not necessarily or even probably negate an intent to kill. More likely it reinforces the firmness of the actor's resolve to take the life of another. At most, therefore, provocation affects the quality of the actor's state of mind as an indicator of moral blameworthiness. Provocation is thus properly regarded as a recognition by the law that inquiry into the reasons for the actor's formulation of an intent to kill will sometimes reveal factors that should have significance in grading. It is a concession to human weakness and perhaps to non-deterability, a recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence.

Model Penal Code § 210.3, comment 5(a) at 54-55 (1962).

Thus, under common-law principles, adequate legal provocation eliminated malice from murder and reduced an unlawful homicide from murder to manslaughter. See *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305 (1968). See, also, *Barrett v. Commonwealth*, 231 Va. 102, 341 S.E.2d 190 (1986) (malice and heat of passion are mutually exclusive). For that reason, the phrase "without malice," in reference to voluntary manslaughter, does not mean "without intention," but means a

"willful act, characterized by the presence of an intent to kill . . . ." *People v. Brubaker*, 53 Cal. 2d 37, 44, 346 P.2d 8, 12 (1959). In *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909), this court mentioned a definition for common-law manslaughter: " 'The unlawful killing of another, without malice . . . upon a sudden heat; or inadvertently, but in the commission of some unlawful act.' "

Another type of criminal homicide which occurred without malice, but which courts sought to punish at common law, was involuntary manslaughter—the defendant's unintentionally killing another during the commission of an unlawful act. Malice was absent from the homicide characterized as "involuntary manslaughter" because the defendant did not intend to kill the victim. However, the defendant's intention to commit the underlying unlawful act supplied the mens rea in a crime for the misdemeanor manslaughter analog to the felony murder rule. 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.13 (1986).

MANSLAUGHTER IN NEBRASKA

There are no common-law crimes in Nebraska. *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986); *Kinnan v. State*, 86 Neb. 234, 125 N.W. 594 (1910).

Within constitutional boundaries, the Legislature is empowered to define a crime and punish a person's conduct expressly declared to be criminal. See, *State v. Douglas, supra*; *State v. Ewert*, 194 Neb. 203, 230 N.W.2d 609 (1975); *State v. Tucker*, 183 Neb. 577, 162 N.W.2d 774 (1968). However, the meaning of words or phrases used in reference to common-law crimes may be helpful in determining the meaning, intent, or effect of a statute which does not contain an express definition of terms in the statute. *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981); *State v. Eynon*, 197 Neb. 734, 250 N.W.2d 658 (1977); *State v. De Wolfe*, 67 Neb. 321, 93 N.W. 746 (1903).

For Nebraska statutes, the Legislature has drawn from the common law to define the crime of manslaughter. Nebraska's initial statute on manslaughter, Rev. Stat. §§ 21 to 24 (1866), provided:

> Manslaughter is the unlawful killing of a human being,

> without malice, express or implied, and without any deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.
>
> § 21.
>
> In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.
>
> § 22.
>
> The killing must be the result of that sudden, violent impulse of passion, supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as a murder.
>
> § 23.
>
> Involuntary manslaughter shall consist in the killing of a human being without any intent so to do, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: *Provided, always*, That where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.

(Emphasis in original.) § 24.

In 1873, however, by Gen. Stat. § 5 (1873), the Legislature amended the manslaughter statute and defined the crime as follows: "If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter . . . ." Noteworthy is the fact that in enacting the 1873 manslaughter

statute, the Nebraska Legislature drew extensively from the criminal code of Ohio. See *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897). Construing the Ohio statutory progenitor of the 1873 Nebraska manslaughter statute, the Supreme Court of Ohio stated in *John Sutcliffe v. The State*, 18 Ohio 469, 476 (1849):

> [T]he entire description of the offence is embraced in these words, to wit: that if any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act; every such person shall be deemed guilty of manslaughter; Swan's Stat. 229. It is evident that the Legislature had in their view, while framing the enactment above quoted, the crime of manslaughter, as well understood at the common law. They have adopted it in substance, and almost in form.

The statutory definition of manslaughter, contained in the General Statutes of 1873, was substantially carried into Comp. Stat. § 28-403 (1929): "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter . . . ."

As a part of the Nebraska Criminal Code, enacted in 1977, § 28-305(1) contained the current definition of manslaughter: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." As noted in *State v. Hutter*, 145 Neb. 798, 802-03, 18 N.W.2d 203, 207 (1945):

> The different degrees of homicide as defined by our statute are all carved out of murder and manslaughter as known to the common law. No new offense has been created, and no homicide which was not criminal at common law is made so by statute, but it is divided into degrees and the punishment graded to meet the circumstances of the particular case. The decisions of this court clearly hold to this view.

In light of the foregoing, § 28-305(1) establishes and distinguishes the two categories of manslaughter: an unlawful

killing, without malice "upon a sudden quarrel," which may be characterized as voluntary manslaughter, and an unlawful but unintentional killing, without malice, as the result of the defendant's commission of an unlawful act, which may be characterized as involuntary manslaughter.

As used in § 28-305(1), the phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. See *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984). Rather, in relation to manslaughter, a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control, or, as expressed in *Savary v. State*, 62 Neb. 166, 175, 87 N.W. 34, 37-38 (1901),

> whether the defendant acted under the impulse of passion suddenly aroused which clouded the reason and prevented rational action . . . whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment . . . .

See, also, *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988), wherein Rincker, carrying a hunting knife, entered a house, discovered his wife on a bed between two naked men, and stabbed to death the victim, one of the men who was on the bed with Rincker's wife. The State charged Rincker with first degree murder on account of the victim's death, that is, premeditated criminal homicide in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985). Notwithstanding that Neb. Rev. Stat. § 29-2027 (Reissue 1985) provides in part, "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter," Rincker contended that the trial court, without request, should not have instructed on manslaughter. This court responded to Rincker's contention: "The jury could well have concluded from the evidence that Rincker's wife was lying on the bed

between the victim and Siegrist and that Rincker reacted to that scene *without any prior intention* to kill the victim. That alone required the trial court to instruct the jury concerning manslaughter." (Emphasis supplied.) 228 Neb. at 534, 423 N.W.2d at 442. In view of the first degree murder charge in *Rincker*, this court's expression "*without any prior intention* to kill the victim," when placed in proper context, clearly refers to Rincker's reaction without premeditation in slaying the victim.

In reference to manslaughter, defined by the General Statutes of 1873 of the State of Nebraska, this court stated in *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909):

> [T]o convict a defendant of manslaughter, it must be proved either that the killing was done in a sudden quarrel, or while the slayer was in the commission of some unlawful act . . . . In the first class of cases referred to in the statute the homicide must have been intentional, but in sudden passion or heat of blood caused by a reasonable provocation, and without malice; in the latter clause the killing must have been unintentional, but caused while the slayer was committing some act prohibited by law . . . .

(Emphasis omitted.)

In *Egbert v. State*, 113 Neb. 790, 799, 205 N.W. 252, 256 (1925), this court approved an instruction which informed the jury in a manslaughter case that

> "to warrant a verdict of guilty [for the crime of manslaughter] the state must satisfy you beyond a reasonable doubt that the revolver at the time and place in question was not accidentally discharged, or, if accidentally discharged, that the defendant was then in the commission of an unlawful act directly connected therewith . . . ."

The instruction approved in *Egbert* must be read in relation to our decisions in which we have considered a criminal assault with a weapon, that is, a defendant's commission of an unlawful act, in reference to an unlawful killing characterized as involuntary manslaughter; for example, see, *State v. Bachkora*, 229 Neb. 421, 427 N.W.2d 71 (1988): defendant claimed that the gun he was holding discharged accidentally, killing the victim; held, an instruction on "accidental" killing

was not required because the defendant admitted pointing the gun at the victim, an act which was a criminal assault and, therefore, an unlawful act which resulted in the homicide; *State v. Drew*, 216 Neb. 685, 687-88, 344 N.W.2d 923, 925 (1984):

> [T]he focus of the inquiry is not whether the gun discharged *accidentally* but, rather, whether the defendant was acting lawfully at the time the gun discharged. The defendant must establish that the use of the gun was privileged at the time it discharged. The threatening use of a firearm is an unlawful assault sufficient to convict one of manslaughter, when defined as causing the death of another unintentionally while in the commission of an unlawful act. § 28-305(1). Similarly, the accidental discharge of a gun, the use of which was not justified under the circumstances, is not a defense to manslaughter when the killing occurred upon a sudden quarrel.

(Emphasis in original); *Ford v. State*, 71 Neb. 246, 98 N.W. 807 (1904): although the defendant believed that the gun was unloaded, the defendant's pointing the gun at the victim constituted a criminal assault as the basis for a manslaughter conviction.

State v. Worley, 178 Neb. 232, 132 N.W.2d 764 (1965), illustrates that in an appropriate factual setting, a jury must decide whether a homicide constitutes murder in the second degree, that is, a person causes another's death intentionally without premeditation (Neb. Rev. Stat. § 28-304 (Reissue 1985)), or whether the homicide is voluntary or involuntary manslaughter. In *Worley*, the defendant, alone in his girlfriend's house, where he awaited her return, fired a pistol at some figurines in the bedroom. As Worley was reloading the weapon, the doorbell rang. On answering the door, Worley found his girlfriend, Lucy, in the company of Ralph Gomez. Worley expressed his concern about what he believed to be the couple's inordinately long absence from the house. After seating himself on a divan, Worley began manipulating the pistol, which appeared to be jammed, when he was approached by Gomez with raised hands. As Worley was handling the apparently jammed pistol, the weapon discharged. When Worley started to get up from the divan, the pistol fired again. Gomez fell to the

floor and died of multiple gunshot wounds in his chest. Although Worley was charged with second degree murder, the jury found him guilty of manslaughter, that is, "killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act." 178 Neb. at 235, 132 N.W.2d at 767. In reviewing the factual background for the discharge of the pistol in Worley's hand, the court stated: "We believe this evidence alone was sufficient for the jury to reach a conclusion that the killing occurred upon a sudden quarrel and in the heat of passion. The lack of intent, as well as intent itself, is a matter peculiarly within the jury's province." 178 Neb. at 236, 132 N.W.2d at 767.

After examining the evidence of "intent" in relation to the charge of manslaughter "upon a sudden quarrel," the *Worley* court then directed its attention to manslaughter in the commission of an unlawful act and expressed the following:

> The court also instructed the jury that the defendant could be found guilty of manslaughter if he shot and killed Gomez while in the commission of an unlawful act of assault and battery. From the same circumstances set out above, the jury possibly could have found that the defendant assaulted Gomez with the weapon in his hand without necessarily rendering the commission of the homicide intentional. Malice, intent, or purpose may be inferred from the shooting of another person with a deadly weapon. But not every assault with a deadly weapon in hand is necessarily conclusive proof of intent or a design to effect death. To come within the provisions of the manslaughter statute, the killing must not have been intentional or with a design to effect death. [Citation omitted.] . . . The question of whether he [Worley] was engaged in an assault on the deceased, and whether it was done with the intent to kill, is peculiarly within the province of the jury.

Id. However, because the State, over Worley's valid objection, introduced prejudicial hearsay regarding Worley's firing the fatal shots into Gomez, the court set aside Worley's conviction and remanded the cause for a new trial.

Courts of other jurisdictions have considered manslaughter

statutes which contain language quite similar to the "sudden quarrel" provision in § 28-305(1). In *People v. Brubaker*, 53 Cal. 2d 37, 346 P.2d 8 (1959), the Supreme Court of California examined Cal. Penal Code § 192 (West 1970), which provided:

> Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:
>
> 1. Voluntary—upon a sudden quarrel or heat of passion.
>
> 2. Involuntary—in the commission of an unlawful act, not amounting to a felony . . . .
>
> 3. In the driving of a vehicle—
>
> (a) In the commission of an unlawful act, not amounting to a felony, with gross negligence . . . .
>
> (b) In the commission of an unlawful act, not amounting to a felony, without gross negligence . . . .

The California court concluded:

> Voluntary manslaughter is a willful act, characterized by the presence of an intent to kill, *engendered by sufficient provocation* and by the absence of premeditation, deliberation and . . . malice aforethought. Section 192, subdivision 1, of the Penal Code defines voluntary manslaughter as the unlawful killing of a human being, without malice, "upon a sudden quarrel or heat of passion."
>
> To be sufficient to reduce a homicide to manslaughter, the heat of passion must be such as would *naturally be aroused* in the mind of an *ordinary, reasonable person* under the given facts and circumstances, or in the mind of a person of *ordinary self-control.* [Citation omitted.]

(Emphasis in original.) 53 Cal. 2d at 44, 346 P.2d at 12.

Under New Mexico's statute, N.M. Stat. Ann. § 30-2-3 (Supp. 1984), manslaughter was defined: "Manslaughter is the unlawful killing of a human being without malice. A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion." In *State v. Lopez*, 79 N.M. 282, 442 P.2d 594 (1968), Lopez and one of his longtime acquaintances had an argument. Shortly after the argument Lopez was seated behind the driver's wheel of his automobile when the "decedent" opened the driver's door, and, almost

instantaneously, a gunshot from within the vehicle felled the victim. Lopez testified that he did not intend to shoot the victim and did not know how or why the gun he was holding discharged. Lopez contended that the victim had grabbed hold of Lopez's jacket and right arm in a manner that such contact might have caused the gun to discharge. On appeal, Lopez argued that the evidence was insufficient to sustain his manslaughter conviction. However, the court, noting the dispute in testimony concerning the fatal occurrence, held that there was sufficient evidence to sustain a conviction for voluntary manslaughter and stated:

> We have not overlooked appellant's argument that the killing was accidental, based upon his testimony that he did not intend to pull the trigger, and didn't intend to shoot. That an accidental killing will not support a conviction of voluntary manslaughter goes without saying. However, just because the appellant testified to this effect does not make it so. The evidence is not undisputed, as contended by appellant.

Id. at 285, 442 P.2d at 597.

The Supreme Court of Wyoming, in *Searles v. State*, 589 P.2d 386 (1979), construed Wyo. Stat. § 6-58 (1957), which contained: "Whoever unlawfully kills any human being without malice, expressed or implied, either voluntarily, upon a sudden heat of passion, or involuntarily . . . ." The court in *Searles* stated: "In order to sustain a conviction for voluntary manslaughter, the wrongful act of killing must have been intentional. [Citation omitted.] An accidental killing is not voluntary manslaughter. [Citation omitted.]" 589 P.2d at 389.

Idaho's manslaughter statute, Idaho Code § 18-4006 (1979) provided: "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary . . . ." The Idaho court decided that "[t]he elements of voluntary manslaughter are: (a) an unlawful killing, with (b) the intent to kill, but without malice." *State v. Atwood*, 105 Idaho 315, 318, 669 P.2d 204, 207 (1983). See, also, *Commonwealth v. Pitts*, 486 Pa. 212, 404 A.2d 1305 (1979) (voluntary manslaughter involves the defendant's intentional or voluntary act, that is,

"involves the specific intent to kill but, by reason of passion and provocation, contains no legal malice." 404 A.2d at 1308).

Thus, other courts, construing manslaughter statutes which have language substantially similar, if not identical, to the language of § 28-305(1), have agreed with this court's expression in *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909), regarding voluntary manslaughter, that is, killing another, without malice, "upon a sudden quarrel," namely: "the homicide must have been intentional, but in sudden passion or heat of blood caused by a reasonable provocation, and without malice . . . ." We note that *Boche* has never been overruled.

Consequently, we hold that, to sustain a conviction for voluntary manslaughter under § 28-305(1), that is, a conviction for killing another, without malice, "upon a sudden quarrel," the State, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another. Thus, intentional criminal homicide as the result of legally recognized provocation distinguishes voluntary manslaughter "upon a sudden quarrel" from another intentional criminal homicide, murder in the second degree, namely, "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." § 28-304.

This court, in *Bohanan v. The State*, 15 Neb. 209, 18 N.W. 129 (1883), set aside Bohanan's manslaughter conviction because the trial court erroneously denied a hearing on Bohanan's plea in abatement, wherein Bohanan asserted that the grand jury which returned the indictment against Bohanan was illegally constituted. As stated in *Bohanan*: "For the error in denying the prisoner a trial on the issue taken on his plea in abatement, the judgment must be reversed, the verdict set aside, and the cause remanded to the court below for further proceedings conformable to this opinion." 15 Neb. at 215, 18 N.W. at 131. Notwithstanding its determination that reversible error existed as the result of the trial court's refusal to grant a hearing on Bohanan's plea in abatement, the court, in dicta pertaining to one of Bohanan's tendered instructions rejected by the trial court, found general suitability in an instruction: " 'Manslaughter is the unlawful killing of another without

malice, either express or implied, which may be either involuntary, upon a sudden heat of passion, or inadvertently, upon the commission of some unlawful act.' " *Id.* As noted, however, the comment in *Bohanan* concerning the tendered instruction is dicta. Also, some 25 years after *Bohanan*, but construing the same manslaughter statute which existed when *Bohanan* was decided, this court unequivocally stated that, concerning a criminal homicide involved in manslaughter which occurred "in a sudden quarrel," the "homicide must have been intentional, but in a sudden passion or heat of blood caused by a reasonable provocation and without malice . . . ." *Boche v. State, supra* at 854, 122 N.W. at 75. Thus, remarks about manslaughter in *Bohanan* are unquestionably dicta and, nevertheless, were superseded by the court's dispositive statement on manslaughter in *Boche*.

In *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), Batiste was convicted of first degree murder on account of the victim's strangulation death. Batiste contended that the evidence was insufficient to sustain her murder conviction and that the evidence showed only the basis for a manslaughter conviction for a "killing [which] was a result of a sudden quarrel." 231 Neb. at 486, 437 N.W.2d at 129. In *Batiste*, we concluded: "The facts developed by direct and circumstantial evidence concerning [the victim's] death clearly justified the jury in finding beyond a reasonable doubt a higher degree of homicide than manslaughter," 231 Neb. at 488, 437 N.W.2d at 130; but, having determined that there was sufficient evidence to sustain Batiste's murder conviction, we, nevertheless, expressed: "Thus, to constitute manslaughter, the slayer must have no intention of doing the wrongful act of killing another without just cause or excuse." *Id.*

As a result of today's decision, reaffirming *Boche v. State, supra*, we disapprove of the language in *Batiste* to the effect that an intentional killing is not an element of voluntary manslaughter described in § 28-305(1).

Today's decision, however, does not alter our position that an unintentional killing "while in the commission of an unlawful act" is manslaughter proscribed by § 28-305(1). See *State v. Bachkora*, 229 Neb. 421, 427 N.W.2d 71 (1988).

SUFFICIENCY OF EVIDENCE

Pettit argues that the evidence is insufficient to submit the manslaughter question to the jury.

> "On a defendant's motion to dismiss for insufficient evidence of the crime charged against such defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence."

State v. Pierce, 231 Neb. 966, 970, 439 N.W.2d 435, 439-40 (1989). See, also, *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

> In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

State v. Pierce, supra at 970, 439 N.W.2d at 440. See, also, *State v. Watkins, supra*.

> A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence.

State v. Blue Bird, 232 Neb. 336, 339, 440 N.W.2d 474, 476 (1989).

> Intent is the state of the actor's mind when the actor's conduct occurs. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). "*Intentionally* means willfully or purposely, and not accidentally or involuntarily." *State v. Schott*, 222 Neb. 456, 462, 384 N.W.2d 620, 624 (1986). The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident. *State v. Schott, supra*. "When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such

> elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987).

State v. Pierce, supra at 971, 439 N.W.2d at 440.

It is without reasonable dispute that Frank Pettit's rifle was pointed in the direction of Pandora Pettit when the weapon discharged unless the fatal bullet was a ricochet. During the period shortly before the shooting, whether there was an argument about Frank Pettit's excessive drinking is unclear, but, clearly, Frank Pettit and Pandora Pettit dramatically discussed their very marked differences of opinion concerning Frank's taking his own life. However, in reference to Frank Pettit's conduct, Pandora Pettit's exclamation, "Frank, don't. . . . Stop, Frank," is equivocal. Did the exclamation relate to the rifle intentionally pointed or aimed at Pandora Pettit—a criminal assault? See § 28-310(1)(b). Or was the exclamation directed toward Frank Pettit's effort to commit suicide? Also, approximately 15 seconds elapsed between Pandora Pettit's exclamation and the fatal gunshot.

Physical evidence in Frank Pettit's trial was susceptible to various interpretations. A perpendicular path of the bullet into Pandora Pettit's body may indicate that Pandora was standing upright and that Frank Pettit was also standing upright when the rifle discharged, substantiating a theory that Frank Pettit was aware that he was aiming or pointing the rifle at Pandora and intentionally fired the fatal shot at her. On the other hand, it may be that Pandora Pettit, as she was removing the nylon jacket, leaned over or near Frank Pettit as he was attempting to extract the clip or magazine from the rifle, a situation which might account for lack of alignment between the bullet hole in the jacket and the wound in Pandora Pettit's chest. Perhaps in acute alarm or pathetic protection, Pandora Pettit was raising her hands above her head, when the rifle discharged, thus explaining the lack of alignment between the bullet hole in the jacket and the mortal wound. There may be other theories and inferences based on the evidence, but the equivocality of the evidence, which we have indicated, presented the jury with the question: How did the shooting occur? The court correctly overruled Frank Pettit's motion for directed verdict and

dismissal of the charges against Pettit.

INSTRUCTION ON VOLUNTARY MANSLAUGHTER

Frank Pettit claims error in the court's refusal to give the tendered instruction on "accident."

> To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction; (2) the tendered instruction is a correct statement of the law; and (3) the tendered instruction is warranted by the evidence.

Burns v. Veterans of Foreign Wars, 231 Neb. 844, 853, 438 N.W.2d 485, 491 (1989).

"A trial court, whether requested or not, must instruct the jury on the law of the case, and failure to do so constitutes prejudicial error." *State v. Pierce*, 231 Neb. 966, 975, 439 N.W.2d 435, 443 (1989).

In *Hendricks v. Commonwealth*, 550 S.W.2d 551 (Ky. 1977), the court rejected the defendant's contention that "accident" was a defense to a charge of voluntary manslaughter and stated:

> That a killing was purely accidental is not a "defense" which, under the Penal Code, must be negated if there is evidence to raise it. [Citation omitted.] It is simply a denial that the act was done with the culpable state of mind required by the instructions as a condition precedent to a consideration. Hence, it was not necessary to give a defensive instruction on the theory of accident, because in order to find the appellant guilty the jury necessarily had to negate the explanation (rather than "defense") of accidental killing. [Citation omitted.]

550 S.W.2d at 553.

We agree with the analysis of the Supreme Court of Kentucky concerning the claimed "defense" of "accident" and conclude that "accident" is not a defense to the crime of voluntary manslaughter under § 28-305(1), but does relate to intent to kill, which is an element of the crime of manslaughter committed "upon a sudden quarrel." Therefore, if a court instructs the jury that intent to kill is an element of voluntary manslaughter committed "upon a sudden quarrel," and

otherwise sufficiently defines *intent* or *intentional* relative to the defendant's conduct, the trial court is not required to give a separate instruction on the theory of accident pertaining to the homicide which is the subject of the manslaughter charge against a defendant.

Without our reiterating each item of evidence in Frank Pettit's case, including Pandora's statement shortly before her death, "It was an accident," there was evidence which, if believed, negated Frank Pettit's intention to kill Pandora Pettit, an intent which is an element of voluntary manslaughter categorized in § 28-305(1)—an intentional killing of another, without malice, "upon a sudden quarrel." Under the circumstances, the district court should have instructed the jury that a finding of intent to kill was required to convict Frank Pettit of voluntary manslaughter committed "upon a sudden quarrel." Because Frank Pettit was charged in the alternative, that is, voluntary or involuntary manslaughter, the general verdict supplies no means to ascertain whether the jury found Frank Pettit guilty of involuntary manslaughter rather than voluntary manslaughter. Any further attempted analysis of the verdict would be based on absolute speculation. We are, therefore, unable to conclude that absence of an instruction on intent to kill, as an element of voluntary manslaughter, is harmless error. "Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988). See, also, *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). For that reason, failure to instruct on intent to kill as an element of voluntary manslaughter constitutes reversible error and requires our setting aside the manslaughter conviction of Frank Pettit.

FRANK PETTIT'S OTHER ASSIGNED ERRORS

We have reviewed the record and find that Frank Pettit's other assignments are without merit and, under the circumstances, do not warrant discussion. Consequently, because we have found reversible error in the trial court's failure

to instruct on the voluntary manslaughter charge against Frank Pettit, we need not discuss the assignments of error pertaining to amendment of the information, adduction of evidence, and the allegedly excessive sentence.

REVERSED AND REMANDED FOR A NEW TRIAL.

FAHRNBRUCH, J., dissenting.

Because the majority of the court abolishes a critical distinction between the crime of second degree murder and the crime of manslaughter committed upon a sudden quarrel, I am compelled to dissent. To be guilty of manslaughter committed upon a sudden quarrel, the majority holds, the killer must commit the slaying with intent to kill.

I contend that Nebraska's manslaughter statute abrogates the common law and that the majority fails to give sufficient weight to pronouncements of this court, one of which declares that "[t]o come within the provisions of the manslaughter statute, the killing must not have been intentional or with a design to effect death." *State v. Worley*, 178 Neb. 232, 236, 132 N.W.2d 764, 767 (1965).

COMMON LAW

Common law recognized two types of criminal homicide: murder and manslaughter. Murder was defined as " '[w]hen a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied.' " 2 W. Blackstone, Commentaries on the Laws of England § 229 at 2397 (W. Jones ed. 1916), citing 3 E. Coke, Institutes of the Laws of England ch. VII (1797). Manslaughter was divided into two branches, voluntary and involuntary.

Blackstone defined voluntary manslaughter as follows:

> *If upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter* . . . and the law pays that regard to human frailty as not to put a hasty and deliberate act upon the same footing with regard to guilt. So, also, if a man be greatly provoked . . . and immediately kills the aggressor, though this is not excusable *se defendendo* (in self-defense), since there is no absolute necessity for doing it to preserve himself, yet

> neither is it murder, *for there is no previous malice,* but it is manslaughter. But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder. . . . Manslaughter, therefore, on a sudden provocation differs from excusable homicide *se defendendo* (in self-defense) in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge.

(Emphasis supplied.) 2 W. Blackstone, *supra*, § 225 at 2391-92.

Involuntary manslaughter "differs also from homicide excusable by misadventure in this: that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one." 2 W. Blackstone, *supra*, § 226 at 2392.

NEBRASKA STATUTES

In 1866, in a session before statehood, the legislative assembly of the Territory of Nebraska adopted a criminal code including the following homicide definitions:

> Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome and death thereby occasioned.

Rev. Stat. § 18 (1866).

> Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without any deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

Rev. Stat. § 21 (1866).

In cases of voluntary manslaughter, there must be a

> serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

Rev. Stat. § 22 (1866).

> *The killing must be the result of that sudden, violent impulse of passion, supposed to be* ***irresistible****; for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as a murder.*

(Emphasis supplied.) Rev. Stat. § 23 (1866). (It is noted that Nebraska does not recognize as a defense the concept of "irresistible impulse." *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).)

> Involuntary manslaughter shall consist in the killing of a human being without any intent so to do, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner . . . .

Rev. Stat. § 24 (1866).

In 1873, the ninth session of the Legislature of the State of Nebraska adopted a new criminal code, patterned after Ohio's criminal code. See *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897). That code included the following homicide definitions:

> If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or, if any person, by wilful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death.

Gen. Stat. § 3 (1873).

> If any person shall purposely and maliciously, but

without deliberation and premeditation, kill another; every such person shall be deemed guilty of murder in the second degree; and on conviction thereof, shall be imprisoned in the penitentiary not less than ten years, or during life, in the discretion of the court.

Gen. Stat. § 4 (1873).

If any person shall unlawfully kill another *without malice*, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter; and, upon conviction thereof, shall be imprisoned in the penitentiary, not more than ten years, nor less than one year.

(Emphasis supplied.) Gen. Stat. § 5 (1873).

The 1873 definitions have remained substantially unchanged. Current homicide definitions are found in Neb. Rev. Stat. §§ 28-303, 28-304, and 28-305 (Reissue 1985), and provide:

A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

§ 28-303.

A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

§ 28-304(1).

A person commits manslaughter if he kills another *without malice*, either upon a sudden quarrel, or causes the death of another unintentionally while in the

commission of an unlawful act.

(Emphasis supplied.) § 28-305(1).

The most obvious differences between the 1866 homicide definitions and those adopted in 1873 are the inclusion of second degree murder and the deletion of the voluntary/involuntary manslaughter distinction. In fact, the words "voluntary" and "involuntary" no longer appear in the statute. Legislative history does not exist for this time period; however, it defies logic to assert that the changes made are unimportant.

SECOND DEGREE MURDER AND MALICE

The majority opinion, quoting *State v. Hutter*, 145 Neb. 798, 18 N.W.2d 203 (1945), states:

> "The different degrees of homicide as defined by our statute are all carved out of murder and manslaughter as known to the common law. No new offense has been created, and no homicide which was not criminal at common law is made so by statute, but it is divided into degrees and the punishment graded to meet the circumstances of the particular case. The decisions of this court clearly hold to this view."

It is my position that common-law voluntary manslaughter was subsumed by the crime of second degree murder.

The majority states,

> "The *usual* type of *voluntary manslaughter* involves the intentional killing of another while under the influence of a reasonably-induced emotional disturbance (in earlier terminology, while in a 'heat of passion') causing a temporary loss of normal self-control. Except for this reasonable emotional condition, the intentional killing would be murder."

(Emphasis supplied.) (Quoting 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.10(a) (1986).)

LaFave and Scott also point out:

> [V]oluntary manslaughter is *often* defined in the cases (and, sometimes, by statute) *as if* intent to kill were a required ingredient. *But, theoretically* at least, they might be of the intent-to-do-serious-bodily-injury, or of the

> depraved-heart, types. Thus—to take the most common sort of voluntary manslaughter, a killing while in a reasonable "heat of passion"—*in most cases* the defendant *intentionally kills* the one who has aroused this passion in him. But if, in the throes of such a passion, he should intend instead to do his tormentor serious bodily injury short of death, or if he should, *without intending to kill him*, endanger his life by very reckless (depraved heart) conduct, the resulting death ought equally to be voluntary manslaughter rather than murder or no crime. The great majority of modern statutes, either by a reference to all cases which would otherwise be murder or by similar general language, take this broad view.

(Emphasis supplied.) *Id.* at 253. In my view, Nebraska case law and Nebraska's homicide statutes reflect that Nebraska has done away with the common-law distinctions of voluntary and involuntary manslaughter. Moreover, in Nebraska, a person is only exempt from criminal responsibility when he kills another while the killer is insane (Neb. Rev. Stat. § 29-2203 (Reissue 1985)) or is justified in killing under Neb. Rev. Stat. §§ 28-1406 to 28-1416 (Reissue 1985), Nebraska's justification of use of force act. The Legislature has not seen fit to exempt from criminal responsibility a person who kills another upon a sudden quarrel even though the killing was unintentional. The majority has by judicial fiat made such an exemption.

NEBRASKA CASE LAW

The majority holds that Nebraska's manslaughter statute follows the common law in that it divides manslaughter into two types: voluntary and involuntary. Section 28-305(1) states: "A person commits manslaughter if he kills another *without malice*, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." (Emphasis supplied.)

In support of its voluntary/involuntary conclusion, the majority relies upon *Boche v. State*, 84 Neb. 845, 122 N.W. 72 (1909), in which it was stated that the manslaughter statute did not change the common law. At that time, Nebraska's manslaughter statute was substantially similar to the one

quoted above: "If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter . . . ." Comp. Stat. § 5 (1909).

Boche further held that when the homicide is upon a sudden quarrel, the killing must have been intentional, "but in sudden passion or heat of blood caused by a reasonable provocation . . . ." *Boche* at 854, 122 N.W. at 75. After citing this language, the majority states: "Consequently, we hold that, to sustain a conviction for voluntary manslaughter under § 28-305 (1), that is, a conviction for killing another, without malice, 'upon a sudden quarrel,' the State, by evidence beyond a reasonable doubt, must prove that the defendant *intended to kill*, and did kill, another." (Emphasis supplied.)

Prior to *Boche*, in *Bohanan v. The State*, 15 Neb. 209, 18 N.W. 129 (1883), although the case was decided upon other grounds, this court considered a refused jury instruction defining manslaughter as " 'the unlawful killing of another without malice, either express or implied, *which may be either involuntary, upon a sudden heat of passion*, or inadvertently, upon the commission of some unlawful act.' " (Emphasis supplied.) *Id.* at 215, 18 N.W. at 131.

The court affirmed the trial court's refusal to give this instruction, saying:

> As a general definition of manslaughter *under our statute this was correct*. But it was faulty in this, that the last clause had no application to the evidence. There was no pretense that the act was done "inadvertently upon the commission of some unlawful act." This instruction was, therefore, rightly refused.

(Emphasis supplied.) *Id.*

The *Bohanan* court also wrote, "A *malicious killing*, although done upon a sudden quarrel and in the heat of passion, is murder in the second degree at least." (Emphasis supplied.) *Id.* at 214, 18 N.W. at 131. In 1883, at least, this court recognized that Nebraska's homicide definitions changed the common law.

A decision of this court after *Boche*, *State v. Worley*, 178

Neb. 232, 132 N.W.2d 764 (1965), supports the rationale of *Bohanan*. In *Worley*, the court found that the facts of the case would support a conclusion that the killing occurred either upon a sudden quarrel or in the commission of an unlawful act. After making this finding, the court stated, "To come within the provisions of the manslaughter statute, *the killing must not have been intentional or with a design to effect death*." (Emphasis supplied.) *Id.* at 236, 132 N.W.2d at 767.

In *State v. Drew*, 216 Neb. 685, 344 N.W.2d 923 (1984), the defendant was charged with second degree murder. Drew was convicted of the lesser crime of manslaughter. The defendant claimed that she was acting in self-defense when the decedent was shot and died as a result of a bullet's striking the victim. The transcript reveals that the trial court, when it came to manslaughter, instructed the jury both upon the sudden quarrel and upon the unlawful act theories. No "intent" instruction was given in regard to manslaughter. Drew claimed the trial court erred in failing to instruct the jury that the burden was upon the State to prove beyond a reasonable doubt that the killing was not accidental. In upholding Drew's manslaughter conviction, this court declared:

> The threatening use of a firearm is an unlawful assault sufficient to convict one of manslaughter, when defined as causing the death of another unintentionally while in the commission of an unlawful act. . . . *Similarly, the accidental discharge of a gun, the use of which was not justified under the circumstances, is not a defense to manslaughter when the killing occurred upon a sudden quarrel.*

(Emphasis supplied.) *Id.* at 687-88, 344 N.W.2d at 925.

In *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988), this court affirmed the manslaughter conviction of the defendant. Rincker assigned as error the trial court's giving a manslaughter instruction, because he did not request such an instruction. We said: "The jury could well have concluded from the evidence that Rincker's wife was lying on the bed between the victim and Siegrist and that Rincker reacted to that scene *without any prior intention to kill the victim. That alone required the trial court to instruct the jury concerning*

manslaughter." (Emphasis supplied.) *Id.* at 534, 423 N.W.2d at 442.

In *Rincker*, this court also pointed out that "the fact remains that he [Rincker], albeit unintentionally, took a life," *id.* at 535, 423 N.W.2d at 442, and "[t]he manslaughter was an unintentional act; bringing the knife to the scene was an intentional act," *id.* at 535, 423 N.W.2d at 443. Nowhere does the opinion hold that it was illegal for Rincker to carry the knife to the scene.

These cases indicate that manslaughter in Nebraska does not require an intent to kill, whether the killing be upon a sudden quarrel or in the commission of an illegal act. I contend that *Boche*, sub silentio, has been overruled and that Nebraska no longer recognizes common-law voluntary and involuntary manslaughter or that intent to kill is an element of voluntary manslaughter.

The majority cites cases from California, Wyoming, New Mexico, and Idaho. Each out-of-state case is distinguishable in that the statutes considered *all specifically denote and define voluntary and involuntary manslaughter*. As shown above, the Nebraska statutes have not recognized these two types of manslaughter since 1873.

Even though the words "voluntary" and "involuntary" have not been a part of Nebraska's manslaughter statute since 1873, the majority insists upon reading them into our manslaughter statute.

Prior to adoption of the current criminal code in 1977, the second degree murder statute required that the killing be done "purposely and maliciously." Neb. Rev. Stat. § 28-402 (Reissue 1975). The new code defined second degree murder as a killing done "intentionally, but without premeditation." § 28-304. However, malice continues to be judicially required as an element of second degree murder. See *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). This construction comports with legislative history which states that the new section is "comparable" to the former section. Summary of Contents L.B. 38, Judiciary Committee, 85th Leg., 1st Sess. 3 (1977).

It is my contention that "malice" is a judicially supplied essential element in second degree murder to distinguish second

degree murder from an intentional killing that is permitted by law under certain circumstances, i.e., a person's or law enforcement officer's killing someone where legally permissible under Nebraska's justification for use of force statutes, §§ 28-1406 to 28-1416.

This court's first attempt at defining malice after adoption of the 1873 criminal code appears to have been in *Milton v. The State*, 6 Neb. 136 (1877). That case held that malice is " '[t]he doing a wrongful act intentionally without just cause or excuse.' 2 Bouv. Law Dict., 91." 6 Neb. at 143.

This rule was expanded in *Carr v. State*, 23 Neb. 749, 756, 37 N.W. 630, 633 (1888), which defined malice as

> a wicked and mischievous purpose which characterizes the perpetration of a wrongful or injurious act intentionally committed without lawful excuse. It is a mental condition on the part of the actor supposed to exist at the time of the commission of the offense, and is *imputed* to "doing of an unlawful act intentionally, without just cause or excuse."

The court in *Carr* cited *Milton*, but felt the rule was incomplete. *Carr* also cites the following definition:

> "Malice, in the definition of murder, is imputed to an act done willfully, *malo animo*, an act wrong in itself, and injurious to another, and for which there is no apparent justification or excuse. . . . The natural or necessary conclusion and inference from such an act, willfully done without apparent excuse, are, that it was done *malo animo* in furtherance of the wrongful, injurious purpose, *previously*, though perhaps suddenly, formed, and is, therefore, 'a homicide with malice of forethought,' which is the true definition of murder."

Carr at 755-56, 37 N.W. at 633.

Carr was discussed in *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895). This court stated that " ' "[m]alice," in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind.' " *Id.* at 167-68, 61 N.W. at 572. The court further stated that the above definition was substantially within the definition approved in *Carr*.

The definition of malice announced in *Housh* is nearly the same as the definition stated in *State v. Batiste*, 231 Neb. 481, 488, 437 N.W.2d 125, 130 (1989): " 'Malice,' in a legal sense, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse." Obviously, the definition of malice has changed very little since 1877 and not at all since 1895.

The difference between second degree murder and manslaughter is significant. Second degree murder is committed when the killing is done intentionally without just cause or excuse, i.e., with malice; manslaughter is committed when the killing is without malice. Regardless of what the common-law definition may have been, malice, in Nebraska, is the intentional doing of an unlawful act without just cause or excuse. If a person is killed intentionally, whether done "upon a sudden quarrel" or not, the act is obviously done with malice, because killing another is an unlawful act unless the killing is exempt under §§ 28-1406 to 28-1416. It is logically impossible to distinguish between a killing done intentionally and one done with malice. A killing committed without malice is one committed unintentionally.

WHITE, J., joins in this dissent.

BOSLAUGH, J., dissenting.

I agree that the judgment in this case must be reversed, but it is my opinion that the cause should be remanded with directions to dismiss.

I agree with Judge Fahrnbruch that under the statutes of Nebraska the distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill.

Under our present statutes, murder is the unjustified intentional killing of another. Manslaughter is the unjustified killing of another *without malice*, upon a sudden quarrel or while in the commission of an unlawful act. Malice is the *intentional* doing of a wrongful act without just cause or excuse. Since manslaughter is a killing *without malice*, there can be no intention to kill in committing manslaughter.

In my opinion, there is not sufficient evidence to permit a

jury to find beyond a reasonable doubt that the defendant was guilty of manslaughter. As the majority opinion points out in great detail, the evidence as to how the victim was killed is equivocal.

In determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. *State v. Earlywine*, 191 Neb. 533, 215 N.W.2d 895 (1974). Conjecture, speculation, or the choice of quantitative possibilities is not proof. *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978). The State may not rely alone on inferences that would support a finding of guilt where several inferences are deducible from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved. *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 360 N.W.2d 488 (1985).

It seems to me that the inference that the killing was accidental is at least as strong as the inference that it was a crime. Under those circumstances, a jury cannot be permitted to speculate as to how the victim came to her death.

WHITE and FAHRNBRUCH, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GARY W. JOHNS, APPELLANT.
445 N.W.2d 914

Filed September 22, 1989. No. 88-581.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Prior Convictions: Habitual Criminals.** This state may establish whatever procedural requirements it deems necessary for processing challenges to prior convictions in habitual criminal proceedings.
3. **Prior Convictions: Habitual Criminals: Appeal and Error.** A challenge to a prior conviction may only be raised in a direct appeal or in a separate proceeding

commenced for the express purpose of setting aside the judgment alleged to be invalid, and not in habitual criminal proceedings.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Gary W. Johns appeals both a Douglas County District Court jury verdict finding him guilty of felony theft by receiving stolen property of the value of $800, and the trial court's finding that he is a habitual criminal.

Johns was sentenced to not less than 20 nor more than 30 years' imprisonment. We affirm.

The defendant was charged under Neb. Rev. Stat. § 28-517 (Reissue 1985), which provides that "[a] person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner." If the property has a value of not less than $300, but not over $1,000, the offense is a Class IV felony, carrying a penalty of up to 5 years' imprisonment. Neb. Rev. Stat. §§ 28-105 and 28-518(2) (Reissue 1985).

In his appeal, Johns alleges two assignments of error: (1) that the evidence was insufficient to convict him and (2) that the trial court erred in finding him to be a habitual criminal.

> In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

(Citation omitted.) *State v. Andersen*, 232 Neb. 187, 191, 440 N.W.2d 203, 209 (1989).

Taking the view most favorable to the State, a jury could conclude that the State proved the following facts beyond a reasonable doubt.

Mark Trustin's residence in Omaha, Douglas County, Nebraska, was burglarized between the hours of 3 and 8 p.m. on December 22, 1987. Entry was gained through the back door by breaking the door's glass. A portable television set, a videocassette recorder, and a shotgun, the double-barrel of which was enclosed by a canvas cover with Trustin's name printed on it, were taken. The value of the items stolen totaled $800.

At approximately 7:09 on that same evening, Sharri Fletcher, a police officer employed by the Omaha Police Division, observed a brown station wagon with expired license plates being driven near 52nd Street and Kansas Avenue in Omaha. When Fletcher attempted to stop the vehicle, the station wagon driver tried to elude her. A short chase ensued, during which the station wagon reached speeds of up to 55 miles per hour. The station wagon crashed into a tree. Abandoning the vehicle and stolen property and leaving the key in the ignition and the motor running, the driver fled on foot. Fletcher pursued the driver, but was unable to apprehend him. The policewoman, who at times during the chase came within 10 to 15 feet of the driver, testified that the fleeing driver matched Johns' description.

When Police Officer W. David Dussetschleger arrived at the accident scene about 7:12 p.m. to offer assistance, he turned the key in the ignition, stopping the motor. Since the station wagon and stolen goods were abandoned, Dussetschleger inventoried the vehicle for valuables and found Trustin's stolen property on a rear seat in the station wagon. The stolen property was covered with a plastic tarp. Two latent fingerprints, later identified as those of the defendant, were obtained from the bottom of the television set.

Through a license plate check and additional investigation, police discovered that the station wagon had been recently purchased by the defendant's mother, with whom the defendant

lived. There was evidence that the defendant had borrowed and was using the vehicle on the night in question. There was also evidence that there was only one key to the station wagon and that, when not in use, it was kept in the home where Johns lived.

With respect to his first assignment of error, Johns points to Fletcher's inability to positively identify him at trial. Johns further argues that John More, the crime laboratory technician who testified regarding the identification of the fingerprints found on the television set, should be discredited because More had earlier characterized several points of identification differently in a deposition than he did at trial. Finally, Johns argues that the foregoing, combined with the testimony of several witnesses that the defendant was with them on December 22 and that the vehicle was not operative, demonstrates that the evidence is insufficient to convict him.

The defendant is essentially asking this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, and weigh the evidence. Such is not the province of the Supreme Court but, rather, the province of the fact finder, in this case the jury. *State v. Andersen, supra.* It is apparent from the verdict that the jury did not believe Johns' alibi defense or that the station wagon was not operative. Even though the evidence in large part was circumstantial, it is sufficient to support the jury's guilty verdict. See *State v. Durst*, 232 Neb. 639, 441 N.W.2d 627 (1989).

In his second assignment of error, Johns argues that under *Gonzales v. Grammer*, 848 F.2d 894 (8th Cir. 1988), his two prior convictions may not be used to support a finding that he is a habitual criminal.

It is first noted that Neb. Rev. Stat. § 29-2221 (Reissue 1985) provides in substance that a person who is convicted of a felony and who previously has been twice convicted of a felony and sentenced to prison for terms of not less than 1 year shall be punished for not less than 10 nor more than 60 years. Johns claims the records of his prior convictions do not affirmatively show that he was advised of his constitutional rights or waived them when he entered his pleas of nolo contendere and guilty.

The decision announced in *Gonzales* was subsequently

reviewed in *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). In *Oliver*, the defendant attacked a sentence enhancement for third offense driving while under the influence of alcoholic liquor because his prior convictions failed to show that his guilty pleas had been entered voluntarily and intelligently. This court noted that the U.S. Court of Appeals for the Eighth Circuit held in *Gonzales* that states are free to establish whatever procedural requirements they deem necessary for processing challenges to prior convictions in habitual criminal proceedings. Significantly, the court of appeals based its determination on our holding in *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984), that a defendant could raise in an enhancement proceeding the constitutional invalidity of a prior conviction. However, in *Oliver, supra*, we disapproved our 1984 holding in *State v. Gonzales*. We then held that "such an issue may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid." *Oliver, supra* at 870, 434 N.W.2d at 298. Consequently, Johns may not collaterally attack his prior convictions in this direct appeal. "[I]t has been the rule in this State that to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel." *Id.* at 869, 434 N.W.2d at 297, citing *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987). Therefore, the record must be examined to determine if there exist two counseled prior convictions.

In Johns' case, certified copies of Douglas County District Court proceedings and certified copies of penal complex records were received in evidence. Those records reflect that on October 8, 1975, with counsel present, Johns entered a nolo contendere plea to a felony charge of theft by receiving stolen property. On November 12, 1975, again with counsel present, Johns was sentenced to not less than 2 nor more than 7 years' imprisonment. He was committed to, and received at, the penal complex. This sentence was set aside after a postconviction relief hearing, and Johns, with counsel present, was resentenced on his plea of October 8, 1975, to not less than 2 nor more than 4 years' imprisonment. The evidence shows he was

committed to and served his sentence at the Nebraska Penal Complex. The record further reflects that on September 11, 1980, with counsel present, Johns appeared in the Douglas County District Court and entered a plea of guilty to a felony charge of theft by receiving stolen property. On October 3, 1980, Johns again appeared with counsel in Douglas County District Court and was sentenced to not less than 1⅔ nor more than 5 years' imprisonment. The record reflects he was committed to the penal complex, where he served that sentence. The record establishes the existence of two prior counseled felony convictions. Therefore, Johns' second assignment of error is without merit.

The defendant's conviction and sentence are affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

In *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), I dissented and pointed up the deficiencies in Nebraska's criminal procedure, which, under existing statutes and decisions of this court, does not allow a criminal defendant to challenge a prior plea-based conviction obtained in violation or denial of a right constitutionally guaranteed to the defendant, including the rights specifically mentioned in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), namely, the rights to trial by jury, to remain silent, and to confront accusers. A procedure which a state "deems necessary" to challenge a prior plea-based conviction may be vastly different from a procedure which comports with constitutional guarantees, a dramatically crucial difference which actually exists in Nebraska's procedure to challenge the constitutional validity of a prior plea-based conviction. The absence of an adequate procedure for an effectual challenge to a prior plea-based conviction which is constitutionally invalid offends due process required by the Nebraska and U.S. Constitutions. Since there has been no change, through the Legislature or this court, after *Oliver* to provide a criminal defendant with a means to challenge a prior conviction unconstitutionally obtained, "there is no new thing under the sun," and, hence, with no new twist to *Oliver*, I renew my dissent to the denial of fundamental fairness and due process.

IN RE INTEREST OF R.T. AND R.T., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. V.T., APPELLANT.

446 N.W.2d 12

Filed September 22, 1989. No. 88-837.

1. **Parental Rights: Evidence: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof: Appeal and Error.** A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply, in whole or in part, with a material provision of the rehabilitation plan, and termination of parental rights is in the best interests of the children.
3. **Parental Rights.** A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

John J. Bedel, of Byrne, Rothery, Lewis, Bedel, Tubach & Zielinski, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

V.T., the mother of R.T., born July 12, 1984, and R.T., born January 6, 1986, appeals from an order of the separate juvenile court of Douglas County, Nebraska, which terminated V.T.'s parental rights to the two children. The case was initiated by a petition filed November 4, 1986, with the juvenile court. The petition alleged the two minors were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), in that the children were under 18 years old and lacked proper parental care by reason of the fault or habits of V.T., their mother. At the time of the filing of this petition, the children were in the custody of the Nebraska Department of Social

Services (DSS), where they had been placed on October 18, 1986, by the children's great-grandmother, who was unable to care for the children and was unable to locate V.T.

On December 11, 1986, a hearing was held before the juvenile court. V.T. was present with her court-appointed attorney and admitted the allegations of the petition that the children were within the meaning of § 43-247(3)(a). The court set a disposition hearing for January 16, 1987, and ordered the children to be left temporarily with DSS.

On January 16, a disposition hearing was held. V.T. was present at the hearing with her attorney. Statements to the court indicated that V.T. was in the Douglas County Correctional Center. The court ordered that the children remain in the temporary custody of DSS and ordered V.T. to comply with the court's order requiring her to obtain legal employment and establish suitable housing, to undergo psychological and chemical dependency evaluations and to follow the recommendations resulting from the evaluations, to participate in parenting classes, to maintain consistent visitation with the children as arranged by DSS, and to cooperate with all professionals in the case.

On July 16, 1987, a review hearing was held in the juvenile court. V.T. and her attorney were present. Evidence adduced at this hearing showed that V.T. had been released on January 26, 1987, from her incarceration at the time of the disposition hearing, but had not contacted DSS or any professionals involved in her case until February 10, 1987. DSS arranged visitations for V.T. with her children during the time between February 19 and March 12, 1987. On March 20, 1987, V.T. was sentenced to incarceration at the Douglas County Correctional Center for 6 months for shoplifting.

At the time of the July 16 hearing, V.T. was 18 years old and pregnant by a man who was not the father of either of the children involved in this case. V.T. sought visitation at the correctional center with her children, but those visitations were denied by the court because of the ages of the children and the location of the requested visitations. Also, the juvenile court ordered another review 6 months later and ordered V.T. to comply with the same general requirements of the January 16,

1987, order, with the additional order that she "refrain from all illegal activities."

A review hearing was held on January 15, 1988. V.T. and her attorney were present. Evidence at this hearing showed that V.T. had been released from incarceration on August 22, 1987, and had complied, in some respects, with the court's order of July 16, 1987, but not fully. V.T. was again ordered to comply with similar requirements, and another review hearing was scheduled 3 months later.

On April 15, 1988, another review hearing was held. V.T. and her attorney were present. Evidence showed that V.T. was again incarcerated, pursuant to a 1-year sentence for shoplifting imposed after the January 1988 hearing. Testimony showed that V.T. had not fully complied with the court's order even before her incarceration.

On May 26, 1988, a motion was filed seeking a termination of V.T.'s parental rights as to the two children involved because of V.T.'s refusal to substantially comply with orders of the juvenile court of January 16, 1987, July 16, 1987, and January 15, 1988.

A hearing was held on this motion on August 16, 1988. V.T. and her attorney were present. Evidence adduced from the clinical psychologist who examined V.T. in June 1987 showed that V.T. would not, or could not, cooperate with necessary treatment to improve her "personality functioning." Much of the problem was based on V.T.'s repeated incarceration, but the fact remained that for whatever reason, V.T. did not cooperate with her psychologist in treatment essential to V.T.'s ability to function in society.

Other testimony showed that V.T. was ordered to participate in individual counseling to deal with her "compulsive shoplifting." She saw a family therapist in that regard three times beginning November 10, 1987, did not attend any such sessions after November 24, 1987, and gave no reason for not continuing the counseling.

Other testimony showed that V.T.'s visitation with her children was sporadic during the times V.T. was not incarcerated. V.T. testified primarily to the effect that she could not visit her children while she was incarcerated because DSS

would not bring the children to the correctional center or to the women's detention center at York, Nebraska. Other testimony showed the inappropriateness of such visitations and the practical difficulties in arranging the visitations.

At the conclusion of the testimony, the court ordered V.T.'s parental rights terminated for V.T.'s noncompliance with the court-ordered plans. V.T. timely appealed to this court, assigning four errors, which may be consolidated into three: (1) The State failed to show by clear and convincing evidence that the mother's rights should be terminated for failure to comply with a plan of rehabilitation; (2) the mother was not allowed sufficient opportunity to comply with such a plan; and (3) the court based its decision to terminate the mother's parental rights solely on her incarceration.

> " 'In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.' "

In re Interest of S.C., S.J., and B.C., 232 Neb 80, 89-90, 439 N.W.2d 500, 506 (1989); *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989); *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989).

With respect to the mother's first assignment of error, the evidence shows that upon the mother's release from the Douglas County Department of Corrections in January 1987, she failed to cooperate with professionals when she waited over 2 weeks before contacting Child Protective Services. Although she occasionally visited her children when she was not incarcerated, she failed to maintain consistent visitation with them as arranged by DSS. She did not follow the recommendations of professionals when she stopped participating in family therapy sessions and when she failed to complete counseling. She also failed to maintain regular employment and housing, although her opportunities to do so were limited as a result of her incarceration. In addition, V.T. did not refrain from illegal

activities. At the time the motion for termination of her parental rights was filed, she was incarcerated for a third offense of shoplifting. A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply, in whole or in part, with a material provision of the rehabilitation plan, and termination of parental rights is in the best interests of the children. *In re Interest of E.B.*, 232 Neb. 653, 441 N.W.2d 637 (1989). There was such clear and convincing evidence in this case. V.T.'s first assignment is without merit.

V.T. contends in her second assignment of error that she was not afforded a reasonable opportunity to comply with the plan of rehabilitation. She asserts that she was unable to maintain suitable housing and employment because of her incarceration and was not afforded reasonable time to comply with the plan's requirements after her release. She also asserts that she committed only one crime of shoplifting after she was ordered to refrain from illegal activities.

The evidence shows that at no time immediately before or after the mother's incarceration did she establish adequate employment, although she had ample opportunity to do so. She was convicted of shoplifting twice before the requirement that she refrain from illegal activities was added to the rehabilitation plan. After a court orders a rehabilitation plan, the court is not prohibited from considering prior events when deciding whether to terminate parental rights. See *In re Interest of P.D., supra*. In the present case, the mother's second assignment of error is without merit.

Finally, the mother assigns as error the trial court's finding that termination of parental rights was solely based on her conviction of a crime and incarceration therefor. This contention does not reflect the facts before the court. In this case, while the fact of incarceration was involuntary as far as V.T. was concerned, her illegal activities leading to incarceration were voluntary on V.T.'s part. "[T]he fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated." *In re Interest of M.L.B.*, 221 Neb. 396, 403, 377 N.W.2d 521, 525 (1985). As stated in *In*

re Interest of Reed, 212 Neb. 208, 211, 322 N.W.2d 411, 413 (1982), "Furthermore, we cannot disregard the appellant's conduct which resulted in his incarceration . . . ."

In this case, V.T.'s repeated shoplifting and subsequent incarcerations, when coupled with the other evidence discussed herein, establish that V.T. willfully failed to comply with the reasonable provisions of the rehabilitation plan. Such refusal is grounds for termination of parental rights. Neb. Rev. Stat. § 43-292(6) (Reissue 1988); *In re Interest of E.B., supra*. In addition, it was clearly in the best interests of the children to terminate her parental rights. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988). The judgment is affirmed.

AFFIRMED.

HARRY A. SCHLOTFELD, APPELLEE AND CROSS-APPELLANT, V. MEL'S HEATING AND AIR CONDITIONING, APPELLANT AND CROSS-APPELLEE, AND WALDINGER CORPORATION, APPELLEE.

445 N.W.2d 918

Filed September 22, 1989. No. 88-1009.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Attorney Fees.** That portion of Neb. Rev. Stat. § 48-125 (Reissue 1988) which provides for the awarding of attorney fees against an employer who fails to obtain any reduction in the amount of an award on rehearing is applicable if the employer requests the rehearing and the total dollar award after rehearing is not less than the amount of the original award.
4. **Workers' Compensation: Wages.** Under Neb. Rev. Stat. § 48-126 (Reissue 1988), money amounts negotiated between a union and employers based on hours worked by union member employees and to be paid directly to the union to cover such things as health and welfare and pensions are not to be included

within the term "wages," unless the money value of such advantages to the employee has been agreed upon and fixed by the employer and employee at the time of hiring.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Stephen L. Ahl, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

Michael G. Goodman, of Matthews & Cannon, P.C., and Gary M. Bodnar for appellee Schlotfeld.

Walter E. Zink II and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Waldinger Corporation.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Mel's Heating and Air Conditioning appeals from the award of the Workers' Compensation Court on rehearing finding that the accident which occurred while appellee Harry A. Schlotfeld was employed by appellant was the sole and proximate cause of Schlotfeld's disability and determining to extend the period that Schlotfeld was temporarily totally disabled. Schlotfeld cross-appeals from the compensation court's award excluding certain fringe benefits from calculation of the average weekly wage upon which his compensation award is based.

On May 27, 1986, Schlotfeld was employed by Mel's as an apprentice sheet metal worker. While helping with the installation of a new ventilation system, Schlotfeld was lifting a fitting for metal ductwork when he felt a sudden, extreme pain in his lower back with pain shooting through the buttocks and down his right thigh. In pain, and unable to straighten up, he left work early and went to see his physician, Dr. James Steier. Dr. Steier admitted Schlotfeld to the hospital for conservative treatment consisting of bed rest, heat application, physical therapy, muscle relaxation medication, and pain medication. Schlotfeld was released to return to work on June 24, 1986, without restriction, with a diagnosis of an acute lumbar strain.

After being discharged from the hospital, Schlotfeld's back was sore, and he suffered constant discomfort with bouts of extreme pain. He was under the impression that his back pain was part of the healing process and that the pain was not enough to warrant going to the physician.

In March 1987, Schlotfeld was working for Olson Bros., Inc., as an apprentice sheet metal worker. On March 19, 1987, he suffered low back pain after lifting a 30-inch elbow—the same type of pain in the same area of his back as he experienced on May 27, 1986, while working for Mel's. On March 20, 1987, Schlotfeld returned to see Dr. Steier because the pain got to the point where he had to have some relief. According to Schlotfeld, he went to see his physician again not because of back strain suffered while working on March 19, 1987, but because of the continuation of pain. Dr. Steier ordered Schlotfeld to take 2 days off from work and then released him to return to work without restriction.

There was evidence that Schlotfeld filled out a workers' compensation report of injury involving the incident on March 19, 1987, when he was moving the 30-inch elbow. However, Schlotfeld denies that he had an accident on March 19, 1987, while working at Olson Bros.

In May 1987, Schlotfeld was working for Waldinger Corporation as a sheet metal worker. On May 7, he worked an ordinary day without incident. The following morning, May 8, 1987, he was unable to get out of bed. He again went to see Dr. Steier.

When Schlotfeld's back failed to improve with conservative treatment, Dr. John Greene, a neurological surgeon, was consulted. After an MRI scan showed a minimal diffuse bulging disk at L4-5 and a myelogram revealed a disk herniation at L4-5 and disk bulging without herniation at L5-S1, surgery was recommended and carried out.

On September 22, 1987, Schlotfeld filed a petition in the Workers' Compensation Court, alleging two accidents, one on May 27, 1986, while working for Mel's, and one on May 7, 1987, while he was employed by Waldinger Corporation. After the initial hearing, one judge of the court concluded that all of Schlotfeld's injuries resulted from the first accident while

employed by Mel's, and dismissed the claim against Waldinger. The court awarded Schlotfeld $208 per week for a period of $20^{3}/_{7}$ weeks for temporary total disability, terminating on August 31, 1987, and $52 per week for a period of $279^{4}/_{7}$ weeks for 25 percent permanent partial disability to the body as a whole.

Mel's requested a rehearing. After rehearing, the compensation court found that all of Schlotfeld's injuries resulted from the first accident. Excluding money paid by Mel's to Schlotfeld's union as a result of Schlotfeld's employment, the court reduced Schlotfeld's award for temporary total disability from $208 per week to $118.20 per week. However, the court increased the amount of time Schlotfeld was to be considered temporarily totally disabled to May 23, 1988, and thereafter for as long as Schlotfeld remained temporarily totally disabled. No finding as to permanent disability was made at that time. As a result of the extension of the temporary total disability period, together with an increase in the amount awarded for medical expenses, and even considering the lower weekly award and the elimination of the permanent partial disability award, the total dollar amount of the judgment awarded Schlotfeld on rehearing exceeded the total amount of the judgment on the first hearing. Accordingly, the court on rehearing awarded Schlotfeld attorney fees of $1,500.

According to the record, Schlotfeld was paid wages of $6.14 per hour while working for Mel's. However, in addition thereto, and pursuant to the union contract with Mel's, an additional $2.31 per hour was paid to the union for every hour Schlotfeld worked to cover health and welfare, pension, a local training fund, and the national training fund. This was apparently a standard contract which applied equally to all employees regardless of their base wage. The record does not reveal whether these benefits were available to Schlotfeld when between jobs, or whether he had to make any contributions on his own to continue to be a recipient of any possible benefits from health and welfare and pension.

On appeal, Mel's assigns as error the finding by the compensation court that the accident of May 27, 1986, while Schlotfeld was working for Mel's, was the cause of Schlotfeld's

disability and the finding by the court on rehearing that Schlotfeld's award on rehearing was greater than his initial award so as to entitle him to an attorney fee. Schlotfeld cross-appealed, contending that the court erred in fixing his wages at $6.14 per hour, the amount actually paid him, rather than the correct wage, including the fringe benefits earlier set forth, totaling $8.45.

Dr. Greene, in a letter dated November 5, 1987, stated that based on the history given him by Schlotfeld, the appellee Schlotfeld herniated his disk as a result of the May 1986 injury. He testified to the same effect in a deposition taken on May 12, 1988.

Dr. Steier testified by deposition taken on May 16, 1988, that in his opinion Schlotfeld's injury and disability resulted from his accident of May 27, 1986, while he was working for Mel's. In a later, supplemental deposition taken of Dr. Steier on June 28, 1988, when told about the alleged second accident of March 19, 1987, he stated that if such an accident did in fact happen, it would be a contributing cause of Schlotfeld's present disability. However, on further questioning, he stated again that he believed the accident of May 27, 1986, was the cause of Schlotfeld's problem.

Taking the testimony of the two physicians and Schlotfeld's denial of a 1987 accident, a question of fact was presented to the compensation court, which found in favor of Schlotfeld. There was sufficient competent evidence to support such a conclusion.

The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1988); *Alley v. Titterington, ante* p. 71, 443 N.W.2d 615 (1989). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Alley, supra.*

In its second assignment of error, Mel's contends that the compensation court erred in awarding attorney fees, because, in fact, on rehearing that court eliminated the permanent

disability award and reduced the amount of the weekly payments. However, as we have pointed out, with the running award as to temporary total disability and the increased award for medical expenses, the net amount of the judgment was increased.

Neb. Rev. Stat. § 48-125 (Reissue 1988) provides in pertinent part as follows:

> If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing . . . .

Ordinarily, the phrase "reduction in the amount of such award" found in § 48-125 refers to the total amount of the award to the employee. See, *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988); *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982). This court interprets the portion of § 48-125 at issue in this case to mean the employee will be awarded an attorney fee if the employer requests the rehearing and the total dollar award after rehearing is not less than the amount of the original award.

In *Beavers v. IBP, Inc.*, 222 Neb. 647, 385 N.W.2d 896 (1986), the court held that the compensation court should have awarded the injured employee an attorney fee on rehearing. The court stated:

> As noted earlier, the compensation court on rehearing . . . doubled the amount of permanent partial disability benefits from a 15-percent disability of the body as a whole to a 30-percent loss of earning power, thereby increasing IBP's potential liability for permanent partial disability from $9,798.97 to $19,597.95. Obviously, IBP did not, by its application for rehearing, obtain any reduction in the amount of Beavers' award on original hearing.

Id. at 654, 385 N.W.2d at 900.

The plaintiff in *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985), was originally awarded

compensation for temporary total disability from September 1, 1982, through the date of the hearing, February 17, 1983, and thereafter so long as he remained totally disabled. Upon rehearing, the plaintiff was awarded compensation for temporary total disability from September 1, 1982, through March 1, 1983, and compensation for permanent partial disability for 274 weeks thereafter. The court decided that, under the circumstances of the case, an award for permanent partial disability on rehearing following an initial award only for temporary total disability entitled the plaintiff to an award of an attorney fee for the rehearing before the compensation court.

An award of attorney fees was upheld in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980). According to the court:

> The contention that the plaintiff was not entitled to an attorney's fee under the provisions of section 48-125, R.R.S. 1943, because on rehearing the injury of July 11, 1978, was found to be noncompensable and medical expense in connection therewith was disallowed, is not meritorious. *The plaintiff did receive a net increase in compensation on rehearing.*

(Emphasis supplied.) *Sidel, supra* at 549, 288 N.W.2d at 486.

It is clear that the compensation court did not act outside the scope of its authority on rehearing when it awarded Schlotfeld compensation for an additional period of temporary total disability and for increased medical expenses. Equally clear is the fact that it is the net increase or decrease in a compensation award after rehearing that determines whether or not the employee is awarded an attorney fee. Mere reduction of one aspect of the compensation award without a corresponding reduction of the total award does not mean the employer obtained a reduction of the award such that the employee is not entitled to an attorney fee.

Schlotfeld's cross-appeal claims the compensation court erred in fixing his wage at $6.14 per hour instead of $8.45 per hour.

At the time of the May 27, 1986, accident, Schlotfeld was a member of the Sheet Metal Workers' International

Association. The union had negotiated, on behalf of its members, a total wage package that was to be paid by employers who hired workers from the union hall. That package consisted of a base wage that was dependent upon whether the worker was an apprentice or a journeyman (in the case of Schlotfeld it was $6.14 per hour), plus the following amounts to be paid by the employer to the union: $1.60 per hour for health and welfare, $.60 per hour for pension benefits, $.05 per hour for a local training fund, and $.06 per hour for the national training fund. The amount paid to the union did not vary depending upon whether the worker was married, whether he or she had any children, or the worker's age.

Schlotfeld's W-2 form showed wages of $6.14 per hour. According to Schlotfeld's testimony, he pays taxes only on the $6.14 per hour, and he never sees the $2.31 in "fringe benefits." The employer gives that money to the union for the various above-mentioned funds.

However, Schlotfeld claims that the $2.31 per hour paid to the union is part of his wage for the purpose of calculating the compensation to which he is entitled.

Neb. Rev. Stat. § 48-126 (Reissue 1988) provides in part:

> Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring, except that if the insurance carrier shall have collected a premium based upon the value of such board, lodging, and similar advantages, then the value thereof shall become a part of the basis of determining compensation benefits.

It is Schlotfeld's position that the amount paid to the union was part of the "money rate" at which his work was recompensed.

There is a split of authority on the issue of whether fringe benefits should be included in the wage calculation for the

purpose of workers' compensation. The majority position excludes fringe benefits from the wage calculation. 2 A. Larson, The Law of Workmen's Compensation § 60.12(b) (1989).

The majority position is exemplified by the decision of the U.S. Supreme Court in *Morrison-Knudsen Constr. Co. v. Director, OWCP,* 461 U.S. 624, 103 S. Ct. 2045, 76 L. Ed. 2d 194 (1983), *rev'g, Hilyer v. Morrison-Knudsen Const. Co.,* 670 F.2d 208 (D.C. Cir. 1981). In *Morrison-Knudsen,* the Court held that an employer's contributions to union trust funds for health and welfare, pensions, and training are not "wages" for purposes of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. Under the act,

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13) (1982). According to the Court, the employer's contributions to union trust funds were not " 'money . . . recompensed' or 'gratuities received . . . from others,' " and therefore the narrow question was whether the contributions were a "similar advantage" to board, rent, housing, or lodging. 461 U.S. at 630.

The Court held that the contributions were not a similar advantage. Board, rent, housing, and lodging were found to be benefits with a present cash value that can be readily converted into a cash equivalent on the basis of their market values, while the present value of the trust funds could not be so easily converted into a cash equivalent.

The suggestion that the value of the trust funds be calculated by reference to the employer's cost of maintaining the funds was rejected. According to the Court, the employer's cost was irrelevant, measuring neither the employee's benefit nor his compensation. The employer's cost does not measure the benefit to the employee because the money could not be taken to the open market to purchase private policies offering similar

benefits to the group policies administered by the union's trustees. The employer's cost likewise does not measure the employee's compensation because the collective bargaining agreement did not tie the employer's costs to its employees' labors. Finding that the employee's interest is "at best speculative," the Court also declined to calculate the value of the fringe benefits by reference to the employee's expectation interest in them. 461 U.S. at 631.

In considering the legislative history of the compensation act, the Court noted that fringe benefits were virtually unknown when the act was passed, but subsequently became common. Although the act has been amended several times, the Court could find no indication that Congress intended to expand the definition of wages to include fringe benefits. Significant to the Court was the fact that over the same years Congress amended the compensation act without including fringe benefits, Congress acted to include fringe benefits in other statutory schemes. *Morrison-Knudsen, supra.*

In further support of its decision to exclude fringe benefits from the wage calculation, the Court declared that a comprehensive statute such as the compensation act is not to be judicially expanded because of "recent trends" and that an expanded definition of wages would undermine the goal of providing prompt compensation to injured workers and their survivors. *Id.*

The issue before the court in *Gajan v. Bradlick Co.*, 4 Va. App. 213, 355 S.E.2d 899 (1987), was whether payments made to a third party to secure fringe benefits for an employee constitute allowances to an employee in lieu of wages. The Virginia statute defining wages for the purpose of workers' compensation provides in part that "[w]henever allowances of any character made to an employee in lieu of wages are a specified part of the wage contract, they shall be deemed a part of his earnings." Va. Code Ann. § 65.1-6 (1987).

According to the court:

> Payments to third parties made to secure fringe benefits to an employee are not payments made to an employee in lieu of wages. Fringe benefits or premiums made to secure them differ in character and purpose from direct

> payments made to employees to compensate them, directly or indirectly, for some aspect of work or to reimburse them for work related expenses.

Gajan, supra at 216, 355 S.E.2d at 901. The court held that health and hospitalization premiums paid by the employer for the employee were neither wages or allowances made to the employee nor payments in lieu of wages for purposes of calculating the employee's average weekly wage.

Health insurance, retirement contributions, and vacation time earned pursuant to a union contract were excluded from the compensation calculation in *Linton v. City of Great Falls*, 230 Mont. 122, 749 P.2d 55 (1988). The employee had argued that the benefits should be included because they were negotiated as part of a union contract and earned in exchange for his labor. Adopting the rationale of *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 103 S. Ct. 2045, 76 L. Ed. 2d 194 (1983), the Montana Supreme Court held that "wages" does not include the employer's contributions to union funds that provide health or life insurance, retirement, training, vacation, pension, or disability payments.

The court in *Nelson v. SAIF*, 302 Or. 463, 731 P.2d 429 (1987), took a different approach. Ignoring the statute defining "wages" for the purpose of workers' compensation, the court instead focused on the statute creating the duty to pay compensation for temporary total disability and prescribing the formula for calculation of the amount to be paid. Under the statute, the injured employee's weekly wage is ascertained by multiplying "the daily wage the worker was receiving" at the time of injury by a figure that depends on how many days per week the employee was regularly employed. According to the court:

> The key question becomes whether claimant was "receiving" the fringe benefits as a part of his daily wage. Certainly, claimant was not receiving the funds in a literal sense. They never came into his physical possession. The money paid for medical and dental insurance was nothing more or less than premiums. The individual members of the class insured, *i.e.*, the employees, had no right *ever to receive* any part of the funds created by payment of those

> premiums. Until an employee might need medical or dental care, he would not even be entitled to any benefit of the insurance created by payment of the premiums, let alone any part of the money. Until an employee became eligible, through retirement or termination, he would have no right to receive any money in the pension fund.

(Emphasis in original.) *Id.* at 469, 731 P.2d at 432. The court held that the employee was not "receiving" the money paid by the employer into the pension fund and for premiums for medical and dental insurance, and thus those amounts were not included in the daily wage the employee was receiving for the purpose of calculating the amount of compensation to which he was entitled.

In *Still v. Industrial Commission*, 27 Ariz. App. 142, 551 P.2d 591 (1976), the court held that fringe benefits were not includable in computation of the employee's average monthly wage at the time of injury. The court focused on the fact that the fringe benefits, paid by the employer directly into the union health and welfare fund and the union pension fund, were not the result of the employee's individual labors but were instead the fruits of collective bargaining efforts. The fact that the employer had no role in determining when, if ever, or to what extent any employee would benefit from the union trust funds was significant to the court. Also important to the court in reaching its decision was the fact that the benefits are not paid to the employee by the employer and thus would not be recoverable in an action at law by the employee against the employer.

Pension plan contributions, health insurance benefits, and life insurance premiums were held to not be includable in the calculation of an employee's average weekly wage in *Rainey v. Mills*, 733 S.W.2d 756 (Ky. App. 1987). Under Kentucky's workers' compensation act, "wages" includes money payments for services rendered and " 'the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent such gratuities are reported for income tax purposes.' " *Id.* at 758. The court found that the fringe benefits were not a "similar

advantage" to an employee as "board, rent, housing, lodging, and fuel." Therefore, given the express language of the statute and the failure of the Legislature to include fringe benefits in any amendments to the workers' compensation act, the court concluded that fringe benefits were not intended to be encompassed by the definition of "wages."

Other state courts have held that fringe benefits are to be included in wage calculations for the purpose of workers' compensation.

In *Ragland v. Morrison-Knudsen Co., Inc.*, 724 P.2d 519 (Alaska 1986), the court held that the value of vested union fringe benefits, including pension, health and welfare, legal fund, and trust benefits, paid by the employer on behalf of the employee is to be included as "wages" for the purpose of computing the employee's average weekly wage. At the time of the injury, under Alaska's workers' compensation act "wages" meant

> "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, and includes the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer."

Id. at 520. Rather than analyzing the fringe benefits under the "similar advantage" clause, the court analyzed them as part of "the money rate" at which an employee is paid.

The *Ragland* court found the rationale of *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 103 S. Ct. 2045, 76 L. Ed. 2d 194 (1983), not applicable. Under the collective bargaining agreement with the union, a total hourly wage rate was negotiated by the union and the employer, and union members voted to determine how the total wage is divided between cash payments and fringe benefits. According to the court, the contribution to fringe benefits was not speculative but, rather, was tied directly to the number of hours worked by the employee. The court found: "There is no principled distinction between cash payments and payments into a fringe benefit plan. Employees may bargain to receive cash only, or may agree to forego some cash in exchange for

fringe benefits. However, their compensable earning power is the same in either case." *Ragland, supra* at 521. Believing that the total hourly wage, no matter how it is apportioned between cash payments and fringe benefits, is "the money rate at which the service rendered is recompensed," the court concluded that the readily identifiable and calculable value of fringe benefits should be included in the wage determination. See, also, *Hite v. Evart Products Co.*, 34 Mich. App. 247, 191 N.W.2d 136 (1971) (employer's contributions for pension fund and group insurance plan should have been included in determining average weekly wage).

Fringe benefits consisting of the weekly premium value of medical, hospitalization, and life insurance policies which were not provided gratuitously to the employee but, rather, were specified as part of the wage contract were held to constitute "allowances of any character" and therefore were includable in the computation of the employee's average weekly wage in *Ex parte Murray,* 490 So. 2d 1238 (Ala. 1986). The statute at issue provided in part that " '[w]hatever allowances of any character made to an employee in lieu of wages are specified as part of the wage contract shall be deemed a part of his earnings.' " *Id.* at 1240. The lower court, finding "whatever allowances" to be synonymous with "similar advantage," adopted the reasoning of *Morrison-Knudsen Constr. Co. v. Director, OWCP, supra*, and held fringe benefits to not be includable in computation of the worker's average weekly wage. On appeal, the Alabama Supreme Court found "similar advantage" and "whatever allowances" to not be synonymous.

According to the court:

> In this case the employer-paid premiums for medical, hospitalization, and life insurance coverage for the employee can be readily converted into a cash equivalent. Instead of providing the fringe benefits, International Paper could have added $10.80 to Murray's paycheck for him to provide his own fringe benefits. Thus, there is a direct relationship between the employer's contribution and the benefit eventually obtained by the worker. Finally, the *Morrison-Knudsen* Court's warning about computation disputes overlooks the likelihood that

> information on the cost of fringe benefits is routinely maintained by the employer for tax purposes and can be ascertained through generally accepted accounting principles and procedures.

Ex parte Murray, supra at 1240.

The court in *Murphy v. Ampex Corp.*, 703 P.2d 632 (Colo. App. 1985), held that the value of expanded group health coverage and supplemental life insurance coverage provided by the employer should have been included as "wages" in determining the amount of the employee's wage loss attributable to injury. The relevant statute provides:

> Whenever the term "wages" is used, it shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of injury, either express or implied, and shall not include gratuities received from employers or others . . . but the term "wages" shall include the reasonable value of board, rent, housing, lodging, or any other similar advantages received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case.

Colo. Rev. Stat. § 8-47-101(2) (1986). The court found that fringe benefits are advantages, often specifically bargained for, that are received by the employee, which are similar to benefits such as board and lodging and, thus, are part of the wages received by the employee.

This issue is one of first impression in Nebraska. The majority view appears to be the more practical and reasonable approach and is the position which we adopt. It seems clear from the definition of "wages" provided in § 48-126 that fringe benefits are not gratuities, nor are they "similar advantages" to board or lodging. The money paid to the union funds should not be considered part of the "money rate" just because it is specified at a per hour rate. The money is not paid to the employee and is not the result of the employee's individual labors, but is the fruit of collective bargaining.

An additional consideration is the fact that the Legislature has amended § 48-126 a few times over the years, yet has never acted to include fringe benefits in the definition of wages. On

the other hand, under Neb. Rev. Stat. § 48-1229(3) (Reissue 1988), fringe benefits are specifically listed as part of an employee's wage for the purpose of the Nebraska Wage Payment and Collection Act. We hold that under § 48-126, money amounts negotiated between the union and employers based on hours worked by union member employees, and to be paid directly to the union to cover such things as health and welfare and pensions are not to be included within the term wages, unless the money value of such advantages to the employee has been agreed upon and fixed by the employer and employee at the time of hiring. Such was not the case here.

The judgment of the compensation court is affirmed. Appellee Schlotfeld is awarded an attorney fee in this court of $2,000 to be taxed to the appellant.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DON RAY WORKMAN, APPELLEE.

446 N.W.2d 16

Filed September 22, 1989. No. 89-114.

Motor Vehicles: Licenses and Permits. Under Neb. Rev. Stat. § 60-418 (Reissue 1988), a former resident of Nebraska whose Nebraska driver's license was suspended or revoked and who obtains a license issued by another state before the period of suspension or revocation expires is not authorized to operate a motor vehicle in Nebraska until a new license is obtained when and if permitted by the Nebraska Motor Vehicle Operator's License Act.

Appeal from the District Court for York County, BRYCE BARTU, Judge, on appeal thereto from the County Court for York County, CURTIS H. EVANS, Judge. Exception to judgment of District Court sustained.

Charles W. Campbell, York County Attorney, for appellant.

Don Ray Workman, pro se.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This is a proceeding under Neb. Rev. Stat. § 29-2319(3) (Reissue 1985) to review the order of the district court affirming the judgment of the county court dismissing the charge against the defendant for driving while his operator's license had been suspended.

The record shows that the defendant, Don Ray Workman, was stopped in York County, Nebraska, on June 25, 1988, while he was driving a truck owned by Roadrunner Freight of Milwaukee, Wisconsin, at 78 miles per hour in a 65-mile-per-hour zone. After being stopped, the defendant produced a New Mexico driver's license that had been issued on March 10, 1986. In checking the defendant's driving record, the patrolman learned that the defendant's Nebraska driver's license had been suspended in January 1986. Although when stopped the defendant was operating a Roadrunner truck, his medical and examination certificates indicated that he had been employed by a Nebraska trucking company as late as October 1987.

The abstract of the defendant's driving record shows that his Nebraska license was suspended on April 9, 1986, for insurance cancellation, and on April 16, 1986, for driving while under suspension. The April 9 suspension was for an indefinite period—until reinstated, and the April 16 suspension was for a period of 365 days from the date of his release from custody.

The defendant's Nebraska license had been revoked under the point system on April 19, 1985. On June 27, 1985, he was arrested in Nebraska for driving under suspension. The defendant testified that his license was suspended by a conviction in county court on or about September 18, 1985, for driving while his license was suspended. He appealed that conviction, but the judgment was affirmed by the district court, and his license was suspended by the judgment of the district court entered on April 16, 1986. Since his license was suspended, the defendant allowed his automobile insurance to expire, and an order of suspension for failure to maintain proof of financial responsibility was entered on April 9, 1986. The defendant did nothing thereafter to reinstate his Nebraska license, and he had no automobile insurance at the time he was arrested on June 25, 1988, except the coverage provided by his

employer, which was applicable while he was operating the employer's truck.

The State argues that the defendant's New Mexico license did not authorize him to drive in Nebraska because it was issued before the two periods of suspension in Nebraska had expired.

Neb. Rev. Stat. § 60-418 (Reissue 1988) provides:

> Any resident *or nonresident* whose operator's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act, shall not operate a motor vehicle in this State under a license, permit or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and if permitted under this act . . . .

(Emphasis supplied.)

Apparently, the county court relied upon *State v. Reeder*, 188 Neb. 121, 195 N.W.2d 509 (1972), as the basis for finding the defendant not guilty.

The *Reeder* case involved a conviction for driving while the defendant's Nebraska operator's license was suspended. The defendant had moved to Colorado and obtained a Colorado license after the suspension period in Nebraska had expired. In this case, the defendant obtained his New Mexico license *before* the period of suspension in Nebraska had expired. Thus, the decision in the *Reeder* case is not applicable to the facts in this case.

Under § 60-418, the New Mexico license which had been issued during the periods of suspension, one of which is still in force, did not authorize the defendant to drive in Nebraska. Consequently, the order of the county court finding the defendant not guilty and the judgment of the district court affirming the order of the county court were erroneous.

EXCEPTION SUSTAINED.

RONALD O. BENDING, APPELLANT AND CROSS-APPELLEE, V. DIANA L. BENDING, APPELLEE AND CROSS-APPELLANT.
446 N.W.2d 236

Filed September 29, 1989. No. 87-984.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Robert E. Roeder for appellant.

George E. Clough for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is an appeal from the Lincoln County District Court's order reducing appellant's alimony obligation from $450 per month to $300 per month. Appellant-petitioner has appealed, and appellee-respondent has cross-appealed.

As required, we have reviewed the trial court's action de novo on the record. *Smith v. Smith*, 232 Neb. 507, 441 N.W.2d 197 (1989). From that review, we determine that the trial court did not abuse its discretion in reducing appellant's alimony payments to $300 per month. The judgment of the trial court is affirmed.

Appellee's request for attorney fees is denied.

AFFIRMED.

JESSE GOMEZ, APPELLANT, V. KENNEY DEANS, INC., APPELLEE.
446 N.W.2d 209

Filed September 29, 1989. No. 88-031.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Steven C. Smith, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from an order of the district court for Scotts Bluff County. The matter arose from the filing of a transcript of judgment from the Workers' Compensation Court to the district court.

Appellee, Kenney Deans, Inc., the judgment debtor, applied to the district court for orders directing the clerk to accept a surety bond of a Nebraska licensed insurer in the amount of $10,000 and to issue a release of the judgment lien against Kenney Deans' real estate in Scotts Bluff County. The district court accepted the surety bond and directed the clerk to issue the release. Gomez, the judgment creditor, appeals.

Two errors are assigned: (1) The district court lacks authority to order substitute security and direct the release of a real estate lien, and (2) the amount of the judgment bond is insufficient.

First, we observe that Kenney Deans, Inc., was insured for workers' compensation claims by the Continental Western Insurance Company, a Nebraska licensed company, and there is no assertion that all amounts due have not been promptly paid.

Putting aside the rather persuasive argument that the power to order a substitution of security is the exercise of the inherent authority of the district court under the Constitution of the State of Nebraska, the authority is also granted by statute. Neb. Rev. Stat. § 52-142 (Reissue 1988) provides:

> (1) Any person having an interest in real estate may release the real estate from liens which have attached to it by:
>
> (a) Depositing in the office of the clerk of the district court of the county in which the lien is recorded a sum of money in cash, certified check, or other bank obligation, or a surety bond issued by a surety company authorized to do business in this state, in an amount sufficient to pay the total of the amounts claimed in the liens being released plus fifteen percent of such total; and

(b) Recording, as provided in section 52-151, a certificate of the clerk of the district court showing that the deposit has been made.

(2) The clerk of the district court has an obligation to accept the deposit and issue the certificate.

(3) Upon release of the real estate from a lien under this section, the claimant's rights are transferred from the real estate to the deposit or surety bond and the claimant may establish his or her claim under sections 52-125 to 52-159, and upon determination of the claim the court shall order the clerk of the district court to pay the sums due or render judgment against the surety company on the bond, as the case may be.

The first assignment is meritless.

As to the second assignment, the appellant is secured by the statutorily directed promise by the insurer to pay "all installments of the compensation that may be awarded or agreed upon . . . ." Neb. Rev. Stat. § 48-146 (Reissue 1988). The record shows that the district court properly set the bond at an amount sufficient to cover the remaining payments of appellant's award. The district court has discretion to set the bond for an amount that has been awarded or agreed upon, not for amounts that are undetermined. The claim is without merit.

AFFIRMED.

DARLENE PERCIVAL, APPELLANT, V. DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

446 N.W.2d 211

Filed September 29, 1989. No. 88-100.

1. **Administrative Law: Appeal and Error.** In an appeal from a judgment pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987), the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the trial court's findings.
2. **Administrative Law.** A commission's or agency's action is arbitrary if taken in disregard of facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Robert Wm. Chapin, Jr., of Mowbray, Chapin & Walker, P.C., for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Darlene Percival appeals from the judgment of the district court for Lancaster County which affirmed the decision of the State Personnel Board of the State of Nebraska regarding Percival's demotion and transfer within the Department of Correctional Services (department).

In an appeal from a judgment pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987), the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the trial court's findings. *Heithoff v. Nebraska State Bd. of Ed.*, 230 Neb. 209, 430 N.W.2d 681 (1988); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

Before the disciplinary action reviewed in this appeal, Percival was the assistant superintendent at the Nebraska Center for Women (NCW) in York, Nebraska, and became acquainted with Carolyn Stansberry, an inmate at NCW. In June 1986, Stansberry was released from NCW on parole to a halfway house in Hastings, Nebraska. In June and July of 1986, Percival visited Stansberry on four occasions, some of which related to Alcoholics Anonymous meetings, while other visits were social. On June 30, 1986, Percival wrote a check to Stansberry in the amount of $350 for Stansberry's purchase of an automobile. Percival's personal contacts with Stansberry and the automobile loan were not authorized by the parole administration and were not disclosed by Percival to her supervisor at NCW.

On August 19, Percival was charged with violating the department's administrative regulation No. 112.31A1, which

provides:

> No employee will give, accept, or exchange property, services, or favors with an inmate or parolee or with the friends or relatives of an inmate or parolee outside the scope of the employee's official duties. No employee will fraternize with an inmate or parolee or with friends or relatives of an inmate or parolee. If an employee has reason to believe that he or she may have violated one of the provisions of this section, the employee shall immediately notify his or her chief executive officer in writing. The chief executive officer of each institution may permit exceptions to the prohibitions set out in his [sic] paragraph, after considering all relevant information.

She was also charged with violating 273 Neb. Admin. Code, ch. 13, § 001 (1986), of the state's classified personnel rules and regulations, which states in part: "Appropriate disciplinary action may be taken for any of the following offenses: 001.01 Violation of, or failure to comply with, State constitution or statute; an executive order; published rules, regulations, policies or procedures of the employing agency or the State of Nebraska Classified Personnel System."

After a hearing on the charges against Percival, a departmental committee found that Percival had violated the department's administrative regulation No. 112.31A1 and § 001.01 of the state's rules and regulations. The superintendent of NCW sent a letter to Percival on September 19, 1986, which letter, as notice of departmental disciplinary action, stated that on account of the violation of departmental regulation No. 112.31A1 and the state rule, § 001.01, Percival was demoted in rank and grade from assistant superintendent II, grade 15, to unit manager, grade 13, and was transferred to the Lincoln Correctional Center. Also, Percival's salary was reduced by 10 percent, and she was put on 6 months' probation regarding her new position at Lincoln.

Percival appealed to the State Personnel Board, which, after a hearing, affirmed the disciplinary action imposed by the department. Percival then appealed to the district court for Lancaster County, which affirmed the State Personnel Board's

decision.

Percival does not contend that there is no rational relationship between the conduct proscribed by regulation No. 112.31A1 and legitimate departmental purposes or activities. Rather, Percival concedes that her conduct violated regulation No. 112.31A1, but argues that the nature and degree of the imposed discipline were contrary to the state's policy on progressive discipline of state employees, the departmental disciplinary action was arbitrary, and the imposed discipline is disproportionate to the infraction.

The state's personnel rules and regulations provide under 273 Neb. Admin. Code, ch. 13 (1986):

> 003 Disciplinary Actions. The following types and levels of disciplinary actions are prescribed in a progressive manner, however, the nature and severity of the violation will dictate the level of discipline imposed. More severe levels of disciplinary action may be imposed when a lesser action is deemed inadequate or has not achieved the desired results. . . .
>
> 003.01 The type and extent of disciplinary action shall be governed by the nature, severity and effect of the offense; the type and frequency of previous offenses; the period of time elapsed since a prior offensive act; and consideration of extenuating circumstances.

Administrative regulation No. 112.6 of the department provides in part:

> IV. This Department advocates the principle of progressive discipline when it is possible. Unless the security of the program is compromised or the employee has committed an offense of serious magnitude, all employees should be given the opportunity to improve and discipline should be progressive in nature.

Under administrative regulation No. 112.6, an employee's conduct which compromises the security of a departmental program or constitutes an offense of "serious magnitude" renders the progressive discipline policy inapplicable. In *Kemper v. State*, 230 Neb. 740, 433 N.W.2d 497 (1988), this court recognized that a financial transaction between a member of a correctional facility's staff and an inmate of the facility

may impair the integrity and security of the facility. In *Kemper*, the discipline imposed was termination of employment rather than progressive discipline. Although progressive discipline of a correctional facility's employee is authorized under both the state rule and departmental regulation, whether progressive discipline should be imposed and implemented is discretionary with the director of the department. We find no reason to overturn the discretionary exercise of disciplinary action taken by the director of the department.

A commission's or agency's action is arbitrary if taken in disregard of facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *In re Application of Renzenberger, Inc.*, 225 Neb. 30, 402 N.W.2d 294 (1987); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985); *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983). Our de novo review of the record discloses relevant evidence substantiating Percival's infraction of the departmental regulation prohibiting a financial transaction between a correctional facility employee and a parolee of NCW. Moreover, Percival has admitted her infraction of the state rule and departmental regulation prohibiting the described financial transaction.

Percival next claims that the discipline imposed is disproportionate to the infraction, especially since there was no injury to the security or departmental program at NCW. The record reflects that on at least four occasions before disciplining Percival, the department terminated employment of personnel who had violated the same rules and regulations which were the bases for the disciplinary action against Percival. The record also shows that, but for Percival's satisfactory work history, her employment might have been terminated. We are unable to conclude that the discipline imposed is disproportionate to the infraction examined in this appeal.

Finally, Percival asserts that because her actions caused no "residual harm" to the department, the discipline was excessive. Percival knew about the regulation prohibiting financial transactions and fraternization with Stansberry as an NCW parolee. Yet, Percival violated the department's rules.

Under the circumstances, actual harm is not required to impose discipline; an employee's violation of a departmental rule, thereby compromising the security or integrity of NCW, is sufficient for disciplinary action. The fact that no adverse effect resulted from Percival's conduct does not preclude discipline under the circumstances.

The district court's judgment, affirming the decision of the State Personnel Board, is, therefore, affirmed.

AFFIRMED.

RICHARD W. SATTERFIELD, TRUSTEE, APPELLANT, V. KATHLEEN LUCILLE BONYHADY, APPELLEE.

446 N.W.2d 214

Filed September 29, 1989. No. 88-163.

1. **Decedents' Estates: Adoption.** An adopted child, in the absence of specific testamentary directions to the contrary, takes from the antecedents of an adoptive parent to the same extent as would the adoptive parent's natural children.
2. **Adoption.** No distinction between adult and minor adoptees will be made for the purposes of Neb. Rev. Stat. § 43-110 (Reissue 1988).
3. **Summary Judgment.** Summary judgment shall be granted where there is no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dan L. McCord for appellant.

Richard A. Vestecka, of Vestecka & Buethe, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Plaintiff, Richard W. Satterfield, trustee, appeals from an order of the district court for Lancaster County granting summary judgment on the cross-petition of the defendant,

Kathleen Lucille Bonyhady, allowing her to take the remainder of a trust as a surviving child of Stanley N. Satterfield, the trust beneficiary.

Appellant Satterfield assigns as error the trial court's order granting defendant's motion for summary judgment. We affirm.

Katherine Satterfield executed her will on October 15, 1942. By the will, Frank Satterfield, her husband, was named as the beneficiary of the trust income during his lifetime. At his death, the property was to be divided among named children and grandchildren. However, in a codicil executed on June 20, 1950, Katherine Satterfield provided that the share of her son Stanley Satterfield should be held in trust for his lifetime and

> [u]pon his death the amount remaining in said fund is to be willed to his child or children *surviving him*, if any, otherwise the same is to be equally divided between those entitled to the same under subparagraph A, to those entitled to the same under subparagraph B and those entitled to the same under subparagraph C.

(Emphasis supplied.) The substitutional devisees—those under subparagraphs A, B, and C—are certain daughters and grandchildren of Katherine Satterfield. The trust in favor of Stanley Satterfield became effective on the death of Frank Satterfield on December 27, 1965.

Stanley Satterfield had no natural-born children. He and his first wife divorced in 1945; he then married Lucille Wozniak in 1958. At the time of this marriage, Lucille had a 16-year-old daughter, Kathleen, the defendant in this case.

On September 17, 1986, Stanley Satterfield, then 74 years old and some 4 1/2 months before his death, adopted Bonyhady, then 44 years old, pursuant to Neb. Rev. Stat. § 43-101 (Reissue 1988), which has allowed for the adoption of adult stepchildren since its amendment in 1984.

Shortly after Stanley Satterfield's death, appellant filed this action to declare that Bonyhady was ineligible to take the trust remainder as a surviving "child" of Stanley Satterfield.

Appellant's main contention is that Katherine Satterfield could not have intended an adopted adult daughter of Stanley Satterfield to come within the term "surviving child" in her

will. This contention invites us to do two things: (1) probe the mind of the testatrix to determine her intent; and (2) make distinctions between adult and minor adoptees as to the "rights, duties and other legal consequences of the natural relation of child and parent . . . ." Neb. Rev. Stat. § 43-110 (Reissue 1988).

Appellant argues that the testatrix's intent to exclude Bonyhady can be presumed because the testatrix was a stranger to the adoption, see *In re Estate of Clarke*, 125 Neb. 625, 251 N.W. 279 (1933), and because adult adoptions were not permitted by statute when the testatrix executed her will and codicil.

Among the cases that appellant cites in support of these presumptions are *Abramovic v. Brunken*, 16 Cal. App. 3d 719, 94 Cal. Rptr. 303 (1971); *Orme v. Northern Trust Co.*, 29 Ill. App. 2d 75, 172 N.E.2d 413 (1961); *First Nat. Bank of Dubuque v. Mackey,* 338 N.W.2d 361 (Iowa 1983); *In re Estate of Griswold,* 140 N.J. Super. 35, 354 A.2d 717 (1976); and *Estate of Goal,* 380 Pa. Super. 219, 551 A.2d 309 (1988).

We decline to look to the law of other states in this matter and rely instead on our own statutes and case law, and on the language in the testatrix's will.

The language and holding of *In re Trust Estate of Darling*, 219 Neb. 705, 708-09, 365 N.W.2d 821, 824 (1985), control:

> [A]n adopted child, in the absence of specific testamentary directions to the contrary, inherits from the antecedents of an adoptive parent to the same extent as do the adoptive parent's natural children.
>
> It is true, as certain of the natural children argue, that the testatrix could not have known of the adoptions, for she had both executed her will and died before they took place. Her lack of knowledge, however, is not significant. She would have been equally ignorant of any natural children sired by Darling after her death. The important point is that she had no control over who became Darling's children or by what means. She chose to benefit Darling's children. He elected to make the children produced by his fourth wife his own by adopting them. Having become his, those children qualify as beneficiaries of the testamentary trust.

Thus, the intent spelled out in Katherine Satterfield's codicil

is the intent to benefit Stanley Satterfield's children, whoever they may turn out to be. This is the plain meaning of the language, and we will go no further in guessing or assuming that Katherine Satterfield meant anything else.

The *Darling* opinion also states that it is clear that § 43-110 negates the *Clarke* holding, which appellant cites as supporting the stranger to the adoption rule.

Appellant would further have us make a distinction between adult and minor adoptees. See, *Williams v. Ward*, 15 Cal. App. 3d 381, 93 Cal. Rptr. 107 (1971); *Tafel Estate*, 449 Pa. 442, 296 A.2d 797 (1972). Section 43-101 provides that "any adult child may be adopted by the spouse of such child's parent . . . ." This statute is narrowly drawn to allow the adoption of adults only where they are stepchildren. Further, § 43-110 states:

> After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.

This statute, giving legal effect to the adoption decree as between the parties, makes no distinction between adult and minor adoptees. We refuse to infer any such distinction.

Therefore, in affirming the trial court, we hold that Bonyhady is the legally adopted child of Stanley Satterfield, and she thereby qualifies under Katherine Satterfield's codicil as a "surviving child" of Stanley Satterfield, thus making her the beneficiary of the testamentary trust.

Appellant also assigned error to the district court in granting Bonyhady's motion for summary judgment. Summary judgment shall be granted where there is no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law. *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681 (1989). The record shows no genuine issue as to any material fact, and this is further evidenced by both parties moving for summary judgment. Appellee was entitled to judgment as a matter of law, and the trial court was correct in granting her summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID SWIGART, APPELLANT.

446 N.W.2d 216

Filed September 29, 1989. No. 88-448.

1. **Convictions: Verdicts: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
2. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
3. **Intent: Words and Phrases.** The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident.
4. **Criminal Law: Intent: Circumstantial Evidence: Proof.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
5. **Assault.** In reference to first degree assault, assaultive conduct which results in exposure to the specific harms described in Neb. Rev. Stat. § 28-109(20) (Reissue 1985), and not actual infliction of the harms described in the statute, is the gravamen of first degree assault and the criminal conduct proscribed by Neb. Rev. Stat. § 28-308(1) (Reissue 1985).

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Joseph D. Nigro for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

A jury in the district court for Lancaster County convicted David Swigart of first degree assault, which is defined by Neb. Rev. Stat. § 28-308(1) (Reissue 1985): "A person commits the

offense of assault in the first degree if he [or she] intentionally or knowingly causes serious bodily injury to another person." Neb. Rev. Stat. § 28-109(20) (Reissue 1985) provides: "Serious bodily injury shall mean bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."

STANDARD OF REVIEW

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Brown, 225 Neb. 418, 428, 405 N.W.2d 600, 606 (1987); *State v. Willett, ante* p. 243, 444 N.W.2d 672 (1989).

> On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Robertson, 223 Neb. 825, 830, 394 N.W.2d 635, 638 (1986). See, also, *State v. Willett, supra*.

In the late evening of August 26, 1987, the female victim, who was 19 years old, was visiting at a Lincoln motel with an acquaintance, Sean Thompson, and David Swigart, age 23, a former boyfriend with whom the victim had been intimately involved in the spring of 1987. In the course of the visit, the victim imbibed a "mixed drink" of "gin and pop" and a "wine cooler"; Thompson drank straight gin; and Swigart had wine coolers. When Thompson became intoxicated, Swigart offered to walk the victim to her home, which was about nine blocks from the motel.

As Swigart and the victim walked, they discussed "the weirdest place . . . the most different, weirdest place we'd both

had sex." En route to the victim's home, the couple approached a van parked on the street and entered the parked vehicle, where they engaged in sexual relations. Having concluded that activity, the couple resumed their walking, which took them to the apartment of Swigart's sister. When they arrived at the apartment, Swigart told the victim that he no longer wished to walk the victim to her home. This upset the victim, who slapped Swigart's face. Swigart, more surprised than hurt by the slap, put his arms around the victim's waist, raised her from the ground, and "[t]hrew her to the ground," causing the victim to "kind of hit on her side" on the concrete surface. As the victim lay on the concrete, Swigart kicked the victim's stomach and then said, "I'm sorry." While the victim was still on the ground, Swigart kicked at the victim, lacerating her nose, and then kicked again, striking near the victim's spine and ribs. At this point, with his closed fist, Swigart delivered a blow to the defenseless victim's face. When the turmoil ended, Swigart went inside his sister's apartment, and the victim returned to Thompson's motel for help. Thompson and his roommate assisted the blood-covered victim, whom Thompson described as "bleeding" with "[t]wo black eyes." After the victim returned to her home, police were summoned and took the victim to the emergency room of a hospital. The victim had a bright crimson crescent-shaped mark, clinically described as "periorbital" bruising, around each eye and displayed lacerations on her nose as well as bruises inside her mouth.

Officers of the Lincoln Police Department went to the apartment of Swigart's sister, who admitted the officers into the apartment. After entering the apartment, the officers opened the bathroom door and found Swigart "holding a tub of potato salad." The officers arrested Swigart and, while transporting him to police headquarters, administered the *Miranda* admonition to Swigart. During interrogation, Swigart admitted that he had "body slammed" the victim to the ground, but asserted, "I didn't really intend to hurt her." Swigart stated that after he had thrown the victim to the concrete surface, "I apologized to her."

When called as a witness for the State, the physician who had attended the victim at the hospital emergency room testified that the physician's specialty was "emergency

medicine," a medical specialty which "basically deals with emergent care in an emergency room, [dealing] with all sorts of life-threatening emergencies and other related emergent care." According to the physician, the victim had sustained "obvious facial trauma . . . a lot of bruising about the face and her nose; she had severe trauma to her nose. It was very widened. It was seriously injured." The victim sustained a "nasal tip fracture of her nose," an injury which was disclosed by x ray and physical examination and was the type of extensive injury which caused one to "cough up blood from swallowing blood." Regarding the kick to the victim's face, the physician stated: "Any time [there is] that kind of an impact to the face and the cranial vault . . . that could be very life threatening. Also to the neck. A lot of people who have severe injuries to the face can also have significant neck trauma and fractures." In reference to a kick in the victim's back, the physician also testified: "That could also be a very serious, possibly life-threatening injury. It could cause damage to the kidneys, spleen. There are all sorts of abdominal organs." A kick to the stomach was also "potentially life-threatening" on account of possible injury to the spleen and liver. When asked whether the injury to the victim's nose would alter a person's appearance, without specialized "follow-up" treatment, the physician responded, "Absolutely."

At trial, testifying on his own behalf, Swigart denied that he had kicked the victim or struck her with his fist. Also, Swigart testified that he did not intend to cause serious bodily injury to the victim.

CLAIM OF INSUFFICIENT EVIDENCE

Swigart contends that there is insufficient evidence to support the verdict of guilty on the charge of first degree assault. Specifically, Swigart maintains that under Nebraska's first degree assault statute, the defendant must intentionally or knowingly cause serious bodily injury and that the victim must in fact suffer serious bodily injury.

Concerning an intent to cause serious bodily injury for a first degree assault, we stated in *State v. Ristau*, 201 Neb. 784, 787, 272 N.W.2d 274, 276 (1978): "To constitute the offense of assault with intent to do great bodily injury there must be an unlawful assault, coupled with a present ability and intent to

injure, but no actual battery need occur." We also stated in *Ristau, supra* at 786-87, 272 N.W.2d at 276:

> The record establishes that the defendant not only threw the victim to the pavement but admitted that he intended to use whatever force was necessary to take her purse. The intent with which an act is done is rarely, if ever, susceptible of proof by direct evidence, but may be inferred or gathered from outward manifestations, words, or acts, and the facts or circumstances surrounding or attendant upon the assault. It is not essential to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as a result of the assault. It is sufficient if serious bodily harm of any kind was contemplated.

See, also, *State v. Tweedy*, 224 Neb. 715, 400 N.W.2d 865 (1987); *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983).

"The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident." *State v. Pierce*, 231 Neb. 966, 971, 439 N.W.2d 435, 440 (1989).

"When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987). See, also, *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989).

Swigart's conduct toward the victim spoke so loudly that the jury apparently did not hear Swigart's self-serving disclaimer of intent. Although Swigart testified that he did not intend to cause serious bodily injury to the victim, the evidence presented to the jury supplied a sufficient basis for the reasonable inference that Swigart intended to inflict serious bodily injury on the victim.

Swigart also argues that to support a conviction of first degree assault, the victim must have actually sustained serious bodily injury, or as Swigart suggests: "The other element on which there was insufficient evidence to sustain a conviction for first degree assault is whether [the victim] did in fact suffer

serious bodily injury." Brief for appellant at 7. In § 28-109(20), which defines "serious bodily injury" in relation to the criminal offense of assault in the first degree, a significant phrase is "bodily injury which involves a substantial risk" of death, serious permanent disfigurement, or diminution of bodily function, that is, protracted loss or impairment sustained by any part of the human body. The word "risk" means "CONTINGENCY, DANGER, PERIL, THREAT . . . someone or something that creates or suggests a hazard or adverse chance: a dangerous element or factor . . . ." Webster's Third New International Dictionary, Unabridged 1961 (1981). As a synonym for risk, the word "danger" means "the state of being exposed to harm: liability to injury, pain, or loss: PERIL, RISK . . . ." *Id.* at 573. Thus, in reference to first degree assault, assaultive conduct which results in exposure to the specific harms described in § 28-109(20), and not actual infliction of the harms described in the statute, is the gravamen of first degree assault and the criminal conduct proscribed by § 28-308(1). Consequently, in *State v. Pribil*, 224 Neb. 28, 30-31, 395 N.W.2d 543, 546 (1986), which involved a conviction for attempted first degree assault, we stated: "Contrary to defendant's argument, it is not necessary that the injury *caused* death, or serious permanent disfigurement or impairment of the function of any part or organ of the body, but only that it *involved a substantial risk* of producing those results." (Emphasis in original.)

At Swigart's trial, the physician testified that a kick to a person's head "could be very life threatening" and that a kick to the back "could also be a very serious, possibly life-threatening injury." The physician's testimony very clearly substantiated and underscored a fact generally known in human experience. The degree or extent of exposure to the harms specified in § 28-109(20), that is, whether such exposure to harm was "substantial," was a submissible jury question under the circumstances.

The evidence supports the verdict. For that reason, we affirm Swigart's conviction.

AFFIRMED.

DAVID A. HENNINGS, APPELLEE, V. THERESA M. HENNINGS, APPELLANT.
446 N.W.2d 221

Filed September 29, 1989. No. 88-842.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed as modified.

Michael L. Getty for appellant.

David A. Hennings, pro se.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage; divided the property of the parties; awarded custody of four of the parties' minor children to the petitioner husband and retained custody of the fifth child in the court, but awarded physical possession to the petitioner; awarded child support to the petitioner in the amount of $95 per month per child; and ordered the petitioner to pay $26,486.64 of the parties' debts. Later, the child support was reduced to $40 per month per child.

The respondent wife has appealed and contends that the trial court erred in awarding custody of the children and child support to the petitioner, in failing to award alimony to the respondent, and in awarding only personal property to the respondent.

The record shows that the respondent failed to keep a suitable home for the children or prepare adequate meals for them. It fully supports the award of custody to the petitioner.

The only real estate owned by the parties was the family residence and a farm the petitioner was purchasing from his family.

The trial court awarded the family residence to the petitioner. The equity in that property is approximately $17,500. Since the petitioner has custody of the children, it is appropriate that he have the property so that he can maintain a home for them.

The indebtedness on the farm far exceeds its value.

The record shows that the petitioner is employed as a salesman, with net earnings of approximately $2,700 per month. The respondent was employed at a Burger King restaurant, earning approximately $542 take-home pay per month.

The petitioner's income is adequate to pay the indebtedness on the residence property, support the children, and pay the other expenses and indebtedness, including the cost of the housekeeper and governess for the children, but will not support an award of alimony.

In view of the limited earning capacity of the respondent and the award of no alimony, we believe the decree should be modified to eliminate the award of child support to the petitioner.

Each party shall pay his or her own attorney fees. Costs in this court are taxed to the petitioner.

The judgment of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF B.M.H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT, V. E.M.H., APPELLEE.

446 N.W.2d 222

Filed September 29, 1989. No. 88-947.

1. **Motions for New Trial: Time: Appeal and Error.** An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal to the Supreme Court, and does not extend or suspend the time limit for filing a notice of appeal.
2. **Jurisdiction: Time: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction, including a notice of appeal filed within the prescribed time.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Appeal dismissed.

Robert M. Spire, Attorney General, and Royce N. Harper for appellant.

Janet S. Gurwitch for appellee.

Carolyn A. Rothery, of Byrne, Rothery, Lewis, Bedel, Tubach & Zielinski, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

On June 9, 1988, the separate juvenile court of Douglas County adjudged that B.M.H. was a juvenile under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and ordered that B.M.H. remain in the temporary custody of the Department of Social Services (department). On September 14, the court ordered B.M.H.'s mother to participate in psychological evaluation and psychotherapy, including group therapy, and further ordered: "The cost of such therapy shall be borne by Nebraska Department of Social Services."

On October 19, the department filed a motion for rehearing or modification of the order which "required the Department of Social Services to bear the cost of psychological therapy" for B.M.H.'s mother, claiming that the court lacked authority to require that the department pay the cost of a parent's therapy. The court overruled the department's motion on November 1, 1988. The department filed its notice of appeal to this court on November 9, 1988.

The department's sole assignment of error is that the juvenile court erred in ordering the department to pay for the psychological treatment of B.M.H.'s parent. However, a prerequisite to a discussion of the department's assignment of error is a determination whether this court has jurisdiction.

Neb. Rev. Stat. § 43-2,126 (Reissue 1988) provides that "[a]ny final order or judgment entered by a separate juvenile court may be reviewed by the Supreme Court of Nebraska within the same time and in the same manner prescribed by law for review of an order or judgment of the district court . . . ."

Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1988) prescribes the time within which a notice of appeal must be filed to vest jurisdiction in this court, namely:

[P]roceedings to obtain a reversal, vacation, or

> modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and . . . by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court.

Section 25-1912(2) provides: "The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial under section 25-1143, if such motion is filed by any party within ten days after the verdict, report, or decision was rendered . . . ."

A final order is "an order affecting a substantial right in an action . . . ." Neb. Rev. Stat. § 25-1902 (Reissue 1985).

The question is whether an order by the separate juvenile court that requires a parent to participate in psychological therapy and also requires the department to pay for such therapy is a final order.

Helpful in our determination whether there is a final order in this case is *In re Interest of G.B., M.B., and T.B.*, 227 Neb. 512, 418 N.W.2d 258 (1988). In *G.B.*, the separate juvenile court of Douglas County ordered, inter alia, that the department pay part of the costs for a juvenile who had been placed in a treatment center. Implicit in our decision to review the propriety of the juvenile court's order in *G.B.* is our conclusion that an order directed to the department to pay for the costs of future treatment is a final order for purposes of § 25-1902. Thus, the juvenile court's order sought to be reviewed in this appeal is a final order.

If a motion for new trial, authorized by law, has been filed within 10 days of a decision (see Neb. Rev. Stat. § 25-1143 (Reissue 1985) and § 25-1912(2)), the motion for new trial suspends the time limit for filing a notice of appeal. When the motion for new trial has been disposed of by the court rendering the decision, appellate jurisdiction is vested in the Supreme Court by compliance with the provisions prescribed by

§ 25-1912, i.e., timely notice of appeal and deposit of docket fee.

In the present appeal, the department's motion, which we characterize as a motion for new trial, was filed on October 19, 1988, more than 10 days after the juvenile court's decision of September 14, 1988, for which the department seeks appellate review. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal to the Supreme Court, and does not extend or suspend the time limit for filing a notice of appeal. *In re Interest of C.M.H. and M.S.H.*, 227 Neb. 446, 418 N.W.2d 226 (1988); *Novak v. Nelsen*, 209 Neb. 728, 311 N.W.2d 8 (1981). Hence, the department's motion was a procedural nullity.

Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1985) states: "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record."

Pursuant to § 25-1912.01(1), the Supreme Court has appellate jurisdiction, notwithstanding the absence of a motion for new trial, if the requirements of § 25-1912 have been satisfied for appellate review of a final order, decision, or verdict in the trial court. See, *Caro, Inc. v. Roby*, 215 Neb. 897, 342 N.W.2d 182 (1983); *State v. Turner*, 221 Neb. 132, 375 N.W.2d 154 (1985).

In the present appeal, without a timely motion for new trial, the department had 30 days from September 14, 1988, to file its notice of appeal. § 25-1912(1). The department's notice of appeal, filed on November 9, 1988, was clearly filed beyond the 30-day limit for filing a notice of appeal. An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction, including a notice of appeal filed within the prescribed time. *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986).

Because the department failed to comply with the requirements of § 25-1912, this court has no jurisdiction, and, accordingly, the department's appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN D. GERDES, APPELLANT.

446 N.W.2d 224

Filed September 29, 1989. No. 88-973.

1. **Judgments: Collateral Estoppel.** The doctrine of collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future litigation.
2. _____: _____. Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.
3. **Judgments: Res Judicata.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
4. _____: _____. The doctrine of res judicata dictates that any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of the action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by the judgment and may not be litigated again between the parties, whether the claim, demand, purpose, or subject matter of the suits would or would not be the same.
5. **Criminal Law: Collateral Estoppel: Proof: Double Jeopardy.** A criminal defendant, relying on collateral estoppel in relation to constitutional protection against double jeopardy in a present proceeding, has the burden to prove that the particular issue which is sought to be relitigated, but which is constitutionally foreclosed by the double jeopardy clause, was necessarily or actually determined in a previously concluded criminal proceeding.
6. **Judgments: Res Judicata: Evidence.** A judgment will not operate as res judicata unless it appears on the face of the record, or is shown by extrinsic evidence, that the precise question was raised and determined in the former suit.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JANICE L. GRADWOHL, Judge. Judgment of District Court affirmed.

Jerry L. Soucie for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

In its complaint filed in the county court for Lancaster County, the State charged that Kevin D. Gerdes, on December 7, 1987, operated a motor vehicle while he was under the influence of alcoholic liquor and alleged that the offense was Gerdes' third violation of the statute against drunk driving. See Neb. Rev. Stat. § 39-669.07 (Reissue 1988). On April 15, 1988, a jury convicted Gerdes of the drunk driving charge. Accompanied by his lawyer, Gerdes appeared for a sentence hearing on May 6, 1988, concerning the enhanced penalty authorized on account of Gerdes' prior convictions for drunk driving.

At the enhancement hearing, the State offered the court records for Gerdes' Nebraska convictions in September 1985 (exhibit 18) and February 1983 (exhibit 20). Over Gerdes' objection (relevance), see Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1985), the court received exhibit 20 as evidence. Exhibit 18 showed that in 1985 Gerdes was initially charged with drunk driving, alleged to be his third such offense, but that the State's complaint was later amended to eliminate reference to any offense before September 1985, that is, "amended to 1st offense." Because exhibit 18 appeared to be a partial record of Gerdes' 1985 drunk driving conviction, at Gerdes' request the enhancement hearing was adjourned until May 25, when Gerdes, accompanied by his lawyer, reappeared for the enhancement hearing.

At the resumed enhancement hearing, Gerdes offered exhibit 21, which supplemented exhibit 18 and thereby supplied the complete court record of Gerdes' 1985 drunk driving conviction. Exhibit 21 contained:

> The Court further finds that the evidence presented to the Court reflects that the Defendant has had no previous conviction(s) under this subsection since the effective date of this act, and that the Defendant has had no previous conviction(s) under this subsection as it existed prior to the effective date of this act and/or under a city or village ordinance enacted pursuant to this subsection as authorized by section 39-669.07 either prior or subsequent to the effective date of this act.

Gerdes again objected to exhibit 20 (1983 conviction) and

moved to strike the exhibit. The court rejected Gerdes' motion to strike exhibit 20. On the basis of exhibits 18, 20, and 21, the court found that Gerdes had been twice convicted of drunk driving before his 1988 conviction and, therefore, the 1988 conviction was Gerdes' third conviction for drunk driving, punishable pursuant to § 39-669.07(4)(c). Consequently, the county court sentenced Gerdes to 5 months in jail, fined him $500, and suspended his driver's license for 15 years. Gerdes appealed to the district court for Lancaster County, which affirmed Gerdes' conviction and sentence.

In his sole assignment of error, Gerdes contends that the county court erred in

> allowing the State to challenge and present evidence collaterally attacking the prior finding of September 25, 1985 that the defendant had no prior convictions under principles of res judicata and collateral estoppel incorporated in the Fifth and Fourteenth Amendments to the United States Constitution.

As we construe the assignment of error, Gerdes claims that the doctrines of collateral estoppel and res judicata preclude use of the 1983 conviction as a basis for imposition of the enhanced penalty for successive convictions of drunk driving.

The U.S. Supreme Court characterized the phrase "collateral estoppel" in *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970):

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

In *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 320, 343 N.W.2d 903, 905 (1984), this court stated:

> Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.

Gerdes also relies on the related doctrine of res judicata.

"The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action." *NC+ Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 310, 422 N.W.2d 542, 545 (1988). Similar to collateral estoppel, the doctrine of res judicata dictates that

> [a]ny right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of the action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by the judgment and may not be litigated again between the parties, whether the claim, demand, purpose, or subject matter of the suits would or would not be the same.

Security State Bank v. Gugelman, 230 Neb. 842, 845, 434 N.W.2d 290, 292 (1989).

Implicit in the excerpts from *Ashe* and *Morrow* is the principle that collateral estoppel applies when an issue in a present proceeding has necessarily been determined in a prior proceeding. A criminal defendant, relying on collateral estoppel in relation to constitutional protection against double jeopardy in a present proceeding, has the burden to prove that the particular issue which is sought to be relitigated, but which is constitutionally foreclosed by the double jeopardy clause, was necessarily or actually determined in a previously concluded criminal proceeding. *U.S. v. Ragins*, 840 F.2d 1184 (4th Cir. 1988). See, also, *U.S. v. Gentile*, 816 F.2d 1157 (7th Cir. 1987).

Concerning the doctrine of res judicata, this court has stated: " 'The general rule is that a person relying upon the doctrine of res judicata as to a particular issue involved in the pending case bears the burden of introducing evidence to prove that such issue was involved and actually determined in the prior action.' " *State ex rel. Weasmer v. Manpower of Omaha, Inc.*, 163 Neb. 529, 534, 80 N.W.2d 580, 583 (1957) (quoting *Schroeder v. Homestead Corp.*, 163 Neb. 43, 77 N.W.2d 678 (1956)). Furthermore, " '[a] judgment will not operate as res judicata unless it appears on the face of the record, or is shown

by extrinsic evidence, that the precise question was raised and determined in the former suit.' " *Manpower of Omaha, supra* at 535-36, 80 N.W.2d at 584 (quoting *O'Connor v. Abbott*, 134 Neb. 471, 279 N.W. 207 (1938)).

In Gerdes' case, the record fails to establish that the existence of the 1983 conviction was an issue resolved by the court in Gerdes' 1985 conviction for drunk driving. In 1985, Gerdes was originally charged with driving under the influence of alcoholic liquor, which was alleged to be his third such offense. The complaint was later amended to eliminate references to any drunk driving conviction before 1985. In the 1985 prosecution and conviction of Gerdes, there is a high probability that the State may not have even attempted to introduce evidence of Gerdes' 1983 conviction since, as the result of the amendment of the 1985 complaint, Gerdes was convicted of "1st offense" drunk driving, and, therefore, the 1983 conviction was irrelevant to the prosecution and conviction of Gerdes in 1985. Moreover, the 1985 complaint against Gerdes, which alleged that the 1985 offense was a "third offense," does not specify the date for any of Gerdes' prior drunk driving convictions which could have been used to enhance the penalty for Gerdes' conviction in 1985. Thus, Gerdes has failed to establish that the court's statement "no previous conviction(s)," contained in the court record for the 1985 conviction, necessarily related to Gerdes' 1983 conviction for drunk driving.

As previously noted, for application of the doctrines of collateral estoppel and res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding. In view of Gerdes' failure to present evidence for proper application of the doctrines of collateral estoppel and res judicata, the county court properly utilized Gerdes' 1983 and 1985 convictions as bases for imposition of the enhanced penalty on successive convictions of drunk driving.

Accordingly, we affirm the district court's judgment, which affirmed Gerdes' conviction and sentence in the county court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. MARCOTTE, JR., APPELLANT.

446 N.W.2d 228

Filed September 29, 1989. No. 88-1052.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court recognizes the trial court as the trier of fact and may take into consideration that the trial court has observed witnesses testifying regarding such motion.
2. **Constitutional Law: Search and Seizure: Warrants: Arrests: Words and Phrases.** Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures. The failure to obtain a warrant is not fatal to the legality of every warrantless arrest. A warrantless arrest of an individual is a species of seizure which, the courts have ruled, must be reasonable. A person is seized when he is arrested.
3. **Police Officers and Sheriffs: Warrants: Arrests: Evidence.** A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe such person has committed a misdemeanor, and the officer has reasonable cause to believe that such person either (1) will not be apprehended unless immediately arrested; (2) may cause injury to himself or others or damage to property unless immediately arrested; (3) may destroy or conceal evidence of the commission of such misdemeanor; or (4) has committed a misdemeanor in the presence of the officer.
4. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime, the officer has probable cause to arrest without a warrant. If the offense is a misdemeanor, then one of the conditions set forth in Neb. Rev. Stat. § 29-404.02 (Reissue 1985) must be present.
5. **Criminal Law: Eyewitnesses: Presumptions.** An informant's detailed eyewitness report of a crime supplies its own indicia of reliability, and a citizen informant who has personally observed the commission of a crime is presumptively reliable.
6. **Police Officers and Sheriffs: Drunk Driving: Warrants: Arrests: Evidence.** Because evidence of a defendant's intoxication would be lost if the police had to wait to obtain a search warrant, a warrantless arrest is valid.
7. **Drunk Driving: Arrests: Blood, Breath, and Urine Tests.** Where a driving under the influence arrest is lawful, the refusal to take a chemical test is unjustified.

Appeal from the District Court for Douglas County, STEPHEN A. DAVIS, Judge, on appeal thereto from the County Court for Douglas County, JOHN J. MCGRATH, Judge. Judgment of District Court affirmed.

Gregory J. Benak, of Hotz, Kizer & Weaver, P.C., for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Complaining that evidence should have been suppressed because he was illegally arrested and that he was justified in refusing to submit to a breath test, Robert D. Marcotte, Jr., asks this court to set aside his convictions for refusing to provide a breath test and for third-offense driving while under the influence of alcoholic liquor. We reject Marcotte's contentions and affirm.

The defendant was originally convicted of the two offenses after a Douglas County Court bench trial. On the refusal to provide a breath test, Marcotte was fined $200 and sentenced to jail for 7 days, and his driver's license was suspended for 180 days. On the third-offense driving while under the influence of alcoholic liquor, Marcotte received a $500 fine and a 90-day jail sentence, and his motor vehicle operator's license was suspended for 15 years. The defendant was also charged with leaving the scene of an accident, but was found not guilty of that charge. He appealed the two convictions to the Douglas County District Court. They were affirmed. Marcotte timely appealed to this court.

In reviewing Marcotte's claim that certain evidence should have been suppressed because he was illegally arrested, we are reminded of this court's holding:

> In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court recognizes the trial court as the trier of fact and may take into consideration that the trial court has observed witnesses testifying regarding such motion.

State v. Andersen, 232 Neb. 187, 199, 440 N.W.2d 203, 213 (1989); *State v. Boysaw*, 228 Neb. 316, 422 N.W.2d 346 (1988).

At the suppression hearing in this case, there was evidence that shortly after midnight on February 24, 1988, Marcotte, a regular customer of a Quick Pic store in Omaha, entered the convenience store. The clerk, Rosemarie Akiens, reported to police that the defendant, who she said was highly intoxicated, purchased some items in the store and after a few minutes left the building. Akiens said she saw the defendant get into his pickup truck, proceed to back up rather quickly, and strike an unoccupied automobile in the parking lot. Marcotte exited his vehicle while it was leaning against the car he had struck. He then pulled his truck forward a little bit.

Akiens went to the accident scene and obtained some information from Marcotte, after which he left the scene. Akiens notified the police, and Officer Michael Kurt Spomer was dispatched to the scene at 12:38 a.m. Spomer arrived at the scene about 10 minutes later. Marcotte telephoned Akiens twice before the police officer arrived at the Quick Pic store. Marcotte gave Akiens his address and telephone number at that time, stating he was sorry and "wanted to take care of it." Upon arrival at the scene, Officer Spomer examined the struck vehicle, a Ford Fairmont, and found that it was damaged. The officer then talked to the clerk, who related that she had seen the accident and what had occurred after the collision. The clerk provided the officer with a description of Marcotte's truck, a license plate number, and the address and telephone number that Marcotte had given her.

The police officer, treating the incident as a hit-and-run accident, went to the address Marcotte had given Akiens, but was unable to locate the defendant. After further investigation, the officer proceeded to a location about six blocks from the Quick Pic store. It developed that Marcotte lived in an apartment complex at that location. It was later determined that the address Akiens reported to the officer as being Marcotte's was one where the defendant had lived previously. The officer observed Marcotte's truck and that it was damaged. Officer Spomer contacted the police dispatcher and requested that the dispatcher call Marcotte at his apartment and ask him

to step outside to talk to Spomer.

About 55 minutes after Spomer had been dispatched, and shortly after the dispatcher was contacted, Marcotte stumbled out the front door of the apartment complex and was hesitant as he walked to the police cruiser. Although it was a clear, chilly night, the defendant wore no shoes. He was dressed in jeans and a flannel shirt. When the defendant arrived at the police cruiser, the officer rolled down his window and smelled a strong odor of alcoholic beverage on Marcotte's breath. The defendant's eyes were bloodshot and glazed. His speech was somewhat mumbled. When Spomer asked him about the accident at the Quick Pic store, Marcotte said that he had been at the store and that he had not been involved in an accident, or "if he was that he didn't do any damage to the car." When asked, the defendant denied drinking any alcohol after leaving the Quick Pic store.

Marcotte, at Officer Spomer's request, performed sobriety tests. He flunked some and refused to perform others. The officer formed an opinion that Marcotte's breath-alcohol content was above the legal limit of .10. Thereupon, the officer placed Marcotte under arrest for suspicion of driving while under the influence of alcoholic liquor and for suspicion of leaving the scene of a property damage accident.

Marcotte claims that in the telephone call to him, the police dispatcher ordered him to leave his apartment and go outside to meet Officer Spomer. Marcotte argues that at that point he was under arrest. Contrary to that contention, it can be inferred from the State's evidence that Marcotte was requested to meet Officer Spomer outside of the apartment complex. On that point, the issue is one of credibility. The trial court believed the State's version of what occurred. Applying the rule in *State v. Andersen, supra*, we cannot say that the trial court was clearly wrong in finding that Marcotte was requested, not ordered, to meet Officer Spomer outside of his apartment complex. Nor can we say that the trial court was clearly wrong in finding (1) that the defendant, without being under arrest, voluntarily complied with the request to meet and talk with Officer Spomer and (2) that Marcotte was not under arrest until Spomer told him he was under arrest.

The defendant claims that because no warrant was issued

before he was arrested, his arrest was illegal, and therefore any evidence obtained as a result of the arrest should have been suppressed. Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Neb. Const. art. I, § 7. The failure to obtain a warrant is not fatal to the legality of every warrantless arrest. As the defendant acknowledges, "A warrantless arrest of an individual is a species of seizure which, the courts have ruled, must be reasonable." Brief for appellant at 7. See *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). A person is seized when he is arrested. *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). Whether the arrest of Marcotte was legal depends upon the reasonableness of his seizure under the circumstances.

The defendant correctly points out that (1) when he was arrested, the arrest was without a warrant; (2) each of the three charges filed against him is a misdemeanor; and (3) none of the offenses for which he was arrested was committed in the presence of the arresting officer. The defendant also correctly argues that without an exigent circumstance, a police officer may not arrest an individual for a misdemeanor unless it is committed in the officer's presence. Marcotte claims that no exigent circumstance existed at the time of his arrest.

The Nebraska Legislature has addressed the reasonableness of a warrantless arrest. Neb. Rev. Stat. § 29-404.02 (Reissue 1985), in regard to arresting persons for misdemeanors without a warrant, provides:

> A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe such person has committed:
>
> . . . .
>
> (2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer.

There is sufficient evidence to support the trial court's finding that when Officer Spomer arrested the defendant, the officer had reasonable cause to believe that Marcotte had committed the misdemeanor of driving while under the influence of alcoholic liquor. "When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime, the officer has probable cause to arrest without a warrant." *State v. Wickline*, 232 Neb. 329, 333, 440 N.W.2d 249, 252-53 (1989). If the offense is a misdemeanor, then one of the conditions set forth in § 29-404.02 must be present.

Before Marcotte's arrest, an eyewitness, the Quick Pic clerk Akiens, had detailed to Officer Spomer that a highly intoxicated man had exited her store, had quickly driven his pickup truck in reverse, and had struck a parked car before driving from the parking lot. Akiens had provided Spomer with a detailed description of the man and the pickup he was driving; his name, address, and telephone number; and the pickup's license plate number. An informant's detailed eyewitness report of a crime supplies its own indicia of reliability, and a citizen informant who has personally observed the commission of a crime is presumptively reliable. *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988); *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987).

Before arresting the defendant, in addition to the detailed information that Akiens had provided him, Officer Spomer also had observed that both the car in the parking lot and Marcotte's pickup were damaged, that the defendant's breath had a strong odor of alcohol, that the defendant's eyes were bloodshot and glazed, that Marcotte's balance was unsure, and that he had stumbled and mumbled and had failed some field sobriety tests. The officer had also established, through questioning, the defendant's identity, that Marcotte had been at the Quick Pic store, and that he claimed not to have been in an accident, or if he had been, that he "didn't do any damage to the car." The officer further established by questioning Marcotte that the defendant had drunk no alcohol after he left the Quick Pic store. Based upon these facts and his training and

experience as a police officer, Spomer concluded that Marcotte's breath-alcohol content was above the legal limit for driving. Obviously, the defendant had driven to his apartment from the Quick Pic store. With the facts provided him and upon that gained by his observations, Spomer arrested the defendant.

After a review of the record, we cannot say that the trial court was clearly wrong in finding that Spomer had probable cause to arrest the defendant. However, this does not end the analysis. It remains to be determined whether the warrantless arrest was proper under these circumstances.

Marcotte argues that his warrantless arrest was not lawful because (1) his identity was known to the officer, and the defendant could be arrested at any time; (2) he was at home, and there was no probable cause to believe that he would injure himself or others or damage property; and (3) there was no probable cause to believe that he would destroy or conceal evidence of the commission of a misdemeanor, as required by § 29-404.02. The State contends that destruction of evidence through dissipation of Marcotte's blood-alcohol or breath-alcohol level over time is sufficient justification under § 29-404.02(2)(c) for a warrantless arrest. The issue has previously been decided favorably to the State's position.

In *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987), this court held that because evidence of a defendant's intoxication would be lost if the police had to wait to obtain a search warrant, a warrantless arrest is valid. See, also, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (holding that because the delay in obtaining a warrant threatened the destruction of evidence due to the diminishment of the alcohol in the blood, a warrantless seizure of a blood sample from a suspected drunk driver was appropriate). There being probable cause to arrest Marcotte and because the warrantless arrest was necessary to preserve evidence, Marcotte's first assignment of error is without merit.

In his last assignment of error, Marcotte argues that his refusal to submit to a chemical test was justified because his arrest was unlawful. However, Marcotte's arrest was lawful. Therefore, his refusal to take the chemical test was unjustified. See *Hoyle v. Peterson*, 216 Neb. 253, 256, 343 N.W.2d 730, 733

(1984) (stating that "[j]ustifiable refusal of the test depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both"). Marcotte's last assignment of error is meritless.

The defendant's convictions and sentences are affirmed.

AFFIRMED.

IN RE INTEREST OF J.M.D., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.D., APPELLANT.

446 N.W.2d 233

Filed September 29, 1989. No. 88-1068.

1. **Parental Rights: Abandonment: Words and Phrases.** Abandonment is an intentional withholding from the child, without just cause or excuse, by the parent of the parent's presence, care, love, and protection; maintenance; and the opportunity for the display of filial affection.
2. _____: _____: _____. The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child.
3. _____: _____: _____. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Roger R. Holthaus and Patrick T. Riskowski for appellant.

Dean Skokan and Brian L. Halstead for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

R.D., the mother of J.M.D., born June 22, 1987, has appealed from the judgment of the county court terminating her parental rights to the child.

The child was born in a motel in Fremont, Nebraska, and removed to the Dodge County Memorial Hospital by the

Fremont Fire Department rescue squad. Temporary custody of the child was given to the Department of Social Services (DSS) by a detention order made June 26, 1987. The child has been in foster care continuously since that time. The father of the child relinquished his parental rights on August 30, 1988.

The petition filed June 26, 1987, alleged that the child lacked proper parental care by reason of the fault or habits of her parents, who neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child, or that the child was in a situation dangerous to life or limb.

At the detention hearing that same day, Jay Moss, protective services worker for DSS, testified that the child was born in a bathroom at Berry's Motel in Fremont. R.D. had never reported to DSS that she was pregnant. When questioned at an evaluation hearing in another proceeding on March 18, 1987, R.D. denied that she was pregnant. The record shows that the mother had denied to DSS that she was pregnant and had received no prenatal care. However, she had planned to have her husband's sister adopt the child, and custody papers had been prepared. When the rescue squad arrived at the motel, she told one of the members of the squad that he should take the child because she was going to give the child away anyway.

The appellant's parental rights to her two older children were terminated on December 31, 1987. All three children are now together in the same foster home.

The supplemental petition to terminate the parental rights of the appellant which was filed June 29, 1988, alleged that the appellant had abandoned the child for a period of 6 months or more immediately prior to the filing of the petition, as provided in Neb. Rev. Stat. § 43-292(1) (Reissue 1988), and that it was in the best interests of the child that the appellant's parental rights be terminated.

It is unnecessary to set out the evidence in detail. The record shows not only an inability to properly care for the child, but a lack of interest in the welfare of the child. The appellant furnished no support for the child, and visitation was sporadic or nonexistent. The appellant visited the child in July 1987 when the child was hospitalized with an infection, but at the time of

the hearing on the supplemental petition to terminate parental rights on September 21, 1988, the appellant had not visited the child since December 29, 1987.

When Sharon Davis, a Child Protective Services worker, called the appellant on June 24, 1988, to notify her of the June 27 evaluation hearing and asked about visitation, the appellant changed the subject to relinquishment and the possibility of adoption. Further, the appellant was angry that she had been called and told Davis to never call again and to mind her own business.

Although the appellant attempted to excuse her failure to visit the child on the ground that she had no transportation, the record shows that was not true.

Between February and March 1988, the appellant lived in Fremont with her parents and drove to Omaha to work. She did not see the child during that time and later conceded that her problems with visitation at that time were not caused by lack of transportation, but with having her "head screwed up." She spent 30 days in jail from January 12 through February 12, 1988, for driving under suspension, second offense, and 7 days in jail in March 1988 for third offense driving under suspension. After that, she moved to Omaha and worked at a restaurant, the Chartroose Caboose. She was afraid to return to Fremont because there was a bench warrant for her arrest. She further testified that she went to see her husband on weekends in Bellevue by taking a bus. She had to ask for time off from work to do this, but she did not ask for time off or take a bus to Fremont to visit her child.

Abandonment has been defined as an intentional withholding from the child, without just cause or excuse, by the parent of the parent's presence, care, love, and protection; maintenance; and the opportunity for the display of filial affection. *Young v. Young*, 588 S.W.2d 207, 209 (Mo. App. 1979), cited in *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

"The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child." *In re*

Adoption of Simonton, 211 Neb. 777, 784, 320 N.W.2d 449, 454 (1982). "Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child." *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 241, 430 N.W.2d 552, 555 (1988).

The finding by the trial court that the appellant "had neither established nor maintained any form of meaningful contact or desire to maintain or develop a relationship with the infant child from the child's birth" and had abandoned the child is supported by clear and convincing evidence. It is in the best interests of the child that the parental rights of the appellant be terminated.

The judgment is, therefore, affirmed.

AFFIRMED.

HELEN L. HAINES, APPELLEE, V. RAY MENSEN AND BARBARA MENSEN, APPELLANTS.

446 N.W.2d 716

Filed October 13, 1989. No. 87-722.

1. **Equity: Reformation.** A proceeding to reform a written instrument is an equity action.
2. **Equity: Appeal and Error.** On appeal to the Supreme Court, an equity action is a trial de novo on the record, requiring this court to reach a conclusion independent of the findings of a trial court, but subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Reformation.** Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties.
4. **Reformation: Evidence: Proof.** Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in reference to the instrument to be reformed.
5. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that

amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.

6. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.
7. **Trial: Rules of Evidence: Appeal and Error.** Error cannot be predicated upon a ruling which excludes evidence where the substance of the evidence was neither made known to the judge by an offer of proof nor apparent from the context within which questions were asked.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Thomas J. Young, of Young & LaPuzza, for appellants.

H. Daniel Smith and Thomas V. Van Robays, of Smith, Trustin & Schweer, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

MCGINN, D.J.

Ray and Barbara Mensen, husband and wife, appeal the order of the Douglas County District Court quieting title to property in the appellee, Helen L. Haines. We affirm.

Since 1958, the Mensens have leased on a month-to-month basis a house owned by the appellee and her husband, Clarence, who died June 22, 1984. In approximately 1963, the Mensens considered purchasing property in Washington County. When the Mensens told the Haineses about the possibility of terminating their lease, the Haineses indicated that they did not want the Mensens to move, as the Haineses had hoped the Mensens would look after them in their old age, since the Haineses had no known relatives.

Over a period of time, Clarence Haines showed Ray Mensen several drafts of deeds and explained the intentions of himself and Helen to deed property to the Mensens in exchange for care and assistance during the Haineses' older years. In December 1980 or early January 1981, Clarence Haines delivered to the Mensens the deed which is the subject of this action. The deed was then filed on January 13, 1981. The Mensens understood that the Haineses were deeding them what was referred to as

"the farm," based upon the Mensens' promise to care for the Haineses during their older years, and that the Haineses would exercise control over the property until the Haineses died, even though the deed had already been delivered.

The deed delivered to the Mensens was executed by Clarence and Helen Haines, conveying to Ray and Barbara Mensen, as joint tenants with the right of survivorship, the following described real estate, which was later quieted in Helen by the trial court: "Part of the Northeast Quarter of the Northeast Quarter of Section 9 Township 16 North Range 13 East all in Douglas County Nebraska as recorded in the Douglas County Register of Deeds office." However, the warranty deed that originally conveyed the property in question to Clarence and Helen as joint tenants described by metes and bounds a 15.34-acre tract of real estate in the northeast quarter of the northeast quarter of Section 9. The Mensens contended the deed should be reformed to include said metes and bounds description.

Approximately 7 months after the death of Clarence, Helen filed her petition, alleging three causes of action: failure of consideration to support the deed because of failure to care for Helen, inadequacy of the legal description, and undue influence on the part of Clarence in Helen's execution of the deed. Through a cross-petition, the Mensens alleged that the legal description contained in the deed was not complete and requested reformation.

The trial court found that there was adequate consideration to support the deed but that the legal description was inadequate, making the deed insufficient to convey title. The court found that there was insufficient evidence to support a reformation of the deed.

The appellants assigned as error the trial court's refusal to allow into evidence testimony of statements of Helen's deceased spouse, Clarence, the failure to order reformation of the deed, the failure to find that Helen was estopped to deny the validity of the deed, and the court's finding that the deed was void. We can consolidate these assignments of error into two issues: the sufficiency of the deed's legal description and the Mensens' request for reformation. A proceeding to reform a written

instrument is an equity action. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986); *Hohneke v. Ferguson*, 196 Neb. 505, 244 N.W.2d 70 (1976). On appeal to the Supreme Court, an equity action is a trial de novo on the record, requiring this court to reach a conclusion independent of the findings of a trial court, but subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989); *Hulinsky v. Parriott*, 232 Neb. 670, 441 N.W.2d 883 (1989).

We said in *Franz v. Nelson*, 183 Neb. 137, 138-39, 158 N.W.2d 606, 607 (1968):

> "While it is true that a deed must describe land so that it can be identified, yet that is certain which by evidence aliunde can be made certain." City of Warsaw v. Swearngin (Mo.), 295 S.W.2d 174. "If the description in a deed identifies, or furnishes the means of identifying, the property conveyed, it performs its function, it being sufficient when from it the property can be identified." Harrison v. Everett, 135 Colo. 55, 308 P.2d 216.

In *Franz*, the following legal description was held to be sufficiently definite, when taken together with external evidence:

> "a strip of land commencing 425 feet East of the middle of the public highway/ betwee (sic) section Nine (9) and Ten (10) Eldorado Township and 900 feet North of the Quarter line of the South west Quarter of section Number Ten (10), Eldorado Township, and running thence due South 2200 feet/ through the South West Quarter of sec. 10 Eldorado Twp. same to be a strip in width 10 feet during the whole of said course."

Franz, supra at 138, 158 N.W.2d at 607. Although "a strip of land" and a "part of" certain land might at first perusal be considered analogous, the "strip of land" in *Franz* was followed by a legal description which gave directions to the strip of land. However, the "part of" land in the deed in the instant case was not followed by directions in the form of a legal

description as to how to find the land.

In *Rupert v. Penner*, 35 Neb. 587, 53 N.W. 598 (1892), the legal description at issue referred to an unspecified, undivided quarter section of Section 16. We held that because the precise quarter of Section 16 was not stated, the description was so defective and imperfect that nothing passed by that writing. Although the deed in *Rupert* was eventually saved because of reference to another instrument, there is no other instrument to make reference to regarding the "part of" land sought to be conveyed in this case. Just as the precise quarter sought to be conveyed in *Rupert* was not described, neither is the precise "part of" land described in the Haines deed.

Because we find that the deed itself was insufficient to convey title, we next review the Mensens' request for reformation of the deed. We said in *Newton, supra* at 612-13, 386 N.W.2d at 429-30:

> Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties. See, *Schweitz v. State Farm Fire & Cas. Co.*, 190 Neb. 400, 208 N.W.2d 664 (1973); Restatement (Second) of Contracts § 155 (1981). . . .
>
> . . . Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in reference to the instrument to be reformed. *Johnson v. Stover*, [218 Neb. 250, 354 N.W.2d 142 (1984)]; *Cunningham v. Covalt*, 204 Neb. 512, 283 N.W.2d 53 (1979). Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. . . .
>
> . . . "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form

> does not express what was really intended by the parties." *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 530, 505 P.2d 867, 873 (1972).

If reformation is to be granted, then, we must first find that the Haineses and the Mensens had reached a meeting of the minds regarding the property. An essential element of a meeting of the minds between the Haineses and the Mensens is the extent of the land that was to be conveyed. Testimony did include statements from both Ray and Barbara Mensen and other neighbors and acquaintances that the Haineses' farm had been left to the Mensens or that the Haineses intended to leave the farm to the Mensens. However, there was no testimony indicating with any detail what property was included when referring to the Haineses' farm. We are left to speculate as to whether the Haineses' farm was in reference to one house and part of the farmland or any other possible combination of property that to the various testifiers represented the Haineses' farm. Furthermore, testimony indicating that several different deeds were drafted over a period of time, and Ray Mensen's testimony that the Haineses approached the Mensens with the deed and that there were no propositions or negotiations regarding the deed, more closely describes a gift than a meeting of the minds. The testimony is not indicative of a meeting of the minds.

The appellants assert that the record demonstrates that if there was insufficient evidence to demonstrate the extent of property to be conveyed, it was the result of the trial court's improperly excluding evidence regarding statements made by Clarence Haines. Testimony from witnesses as to alleged statements made by Clarence was offered by the appellants to prove the truth of the alleged agreement regarding the deed, but was excluded as hearsay. Appellants argue that such testimony should have been permitted because it constituted an admission against interest and because Clarence was acting as an agent authorized to speak for Helen pursuant to Neb. Rev. Stat. § 27-801 (Reissue 1985) or, in the alternative, that the statements represented an exception to the hearsay rule according to Neb. Rev. Stat. § 27-804 (Reissue 1985) because of the death and unavailability of Clarence. We need not decide this issue.

Because no offer of proof was made by the appellants, our review of this alleged error leads us to Neb. Rev. Stat. § 27-103(1) (Reissue 1985), which provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (b) . . . the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." There is no doubt but that a substantial right of the appellants was affected by the excluding of the evidence regarding statements made by Clarence. However, our de novo review of the record indicates that the context of the questioning did not make apparent the substance of the evidence. We find that the need for an offer of proof was not superfluous in this case, and instead reiterate that there is no question but that the better trial practice is always to make an offer of proof when evidence is excluded. *Sherman County Bank v. Kallhoff*, 205 Neb. 392, 288 N.W.2d 24 (1980). Because we find that the substance of the evidence was not apparent from the context of the questioning, the appellants are precluded from alleging this issue as error.

Our de novo review does not reveal clear, convincing, and satisfactory evidence of a meeting of the minds, and therefore there is no basis for reformation. The action of the trial court in quieting title to the property in the appellee is affirmed.

AFFIRMED.

EUNICE BURKEY, APPELLANT, V. SANDRA K. ROYLE AND DONALD H. ROYLE, APPELLEES.

446 N.W.2d 720

Filed October 13, 1989. No. 87-983.

1. **Motor Vehicles: Negligence.** It is a motorist's duty to use reasonable care to prevent a collision or injury from the operation of a motor vehicle, considering the conditions and circumstances existing on the public street or highway.
2. _____: _____. A motorist must keep a proper lookout in the direction in which the motorist's vehicle is operated, take notice of conditions on the street or

highway traveled, and know what is in front of her or him for a reasonable distance.

3. **Negligence.** To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in the conduct and may vary depending on the circumstances.
4. **Motor Vehicles: Negligence.** Ordinarily, the question of the defendant's negligence is one of fact for the jury; however, negligence generally arises as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop her or his vehicle or turn it aside without colliding with an object or obstruction on the street or highway within the operator's range of vision.
5. _____: _____. The range of vision rule is applicable, notwithstanding that a motorist's vision is impaired by atmospheric or weather conditions, such as falling or blowing snow, rain, mist, or fog, and notwithstanding that a motorist's ability to maneuver the vehicle is impaired by the presence of ice or snow upon the road surface.
6. _____: _____. An exception to or exoneration from the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and is thus relatively indiscernible.
7. _____: _____. If the presence of ice or snow upon the road surface is known or should have reasonably been anticipated, the snow and ice are considered conditions rather than intervening causes and thus do not exonerate a motorist from the application of the range of vision rule.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for a new trial on the issue of damages.

Graten D. Beavers, of Knapp, Mues, Beavers & Luther, for appellant.

Thomas W. Tye II, of Tye, Hopkins & Associates, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiff, Eunice Burkey, appeals the dismissal pursuant to verdict of the suit she brought because of a collision between an automobile in which she was a passenger and which was being driven by her husband, Roger Burkey, and an automobile coowned by defendant-appellee Donald H. Royle and his

daughter, defendant-appellee Sandra K. Royle, who was driving that automobile. Plaintiff seeks recovery in her own right for damages she sustained as a consequence of injuries she suffered and for damages her husband incurred and assigned to her. Among plaintiff's assignments of error is the claim that the trial court erroneously and prejudicially refused to instruct the jury, as plaintiff requested, that Royle was negligent and that such negligence proximately caused the collision. Finding merit in that assignment of error, we reverse the judgment of the trial court and remand the cause for a new trial solely on the issue of damages.

The collision occurred in Kearney, Nebraska, at the intersection of 39th Street, an east-west street, and Second Avenue, a north-south street. Second Avenue consists of four traffic lanes, two in either direction, and at the intersection with 39th Street is augmented by left turn lanes for southbound and northbound traffic. At the location of the collision, the two northbound lanes are separated from the southbound lanes by a median.

A grocery store parking lot is located at the northwest corner of the intersection, with two exits onto Second Avenue. The southernmost of these exits is 160 feet from the intersection, and the northernmost exit is 300 feet from the intersection. An automobile dealership is located north of the grocery store parking lot.

The weather was inclement on the day of the collision. According to Roger Burkey, "The roads were definitely getting a lot slicker and the further west we come, the worse it got." By the time the Burkeys reached Kearney, it was snowing—"all the streets were snow packed . . . and they were warning everybody to stay put . . . ." Plaintiff testified that the streets were covered with ice which in turn was blanketed with wet snow, making the streets "slippery and icy." Raul Vasquez, a police sergeant for the city of Kearney who investigated the collision, testified that at the place of the collision the streets were covered with snow and ice and that there was an accumulation of snow which was encroaching on the furthest west driving lane along the eastern side of the grocery store parking lot. However, according to Sandra Royle, it was sleeting, not snowing, at the time of the

collision. "There was a small amount of mist. The roads were starting to get icy as it got later on in the evening. However there wasn't that much snow. What snow there was was packed." "[I]t was more icy than snowy . . . ."

Just before the collision the Burkeys, who had been traveling south on Second Avenue, stopped in the center lane, or furthest left through-traffic lane, at the intersection of Second Avenue with 39th Street because the traffic light was red. Roger Burkey testified that the snow at the intersection was about 6 to 8 inches deep and covered the street markings, so that he could not see them. Because of this, he merely stopped in the tracks other vehicles had made in the snow. He stated, "[T]here was just one set of tracks. There was no lanes or you didn't know where you were at. You were just in the tracks. If you got out of the tracks you'd been stuck."

The parties disagree as to the circumstances of the collision. According to Roger Burkey:

> We were sitting there waiting for the light to turn, and I happened to glance in the rear view mirror. I could see that there was a car coming right behind us further up the road and I happened to see that . . . the vehicle was coming at a pretty good speed. And the closer she come or the vehicle come, why I saw her hit the brakes because the car started to fishtailing and I knew that there was no way she was ever going to get stopped before they hit us. And just right before we got hit, why I threw my arm out. I told [plaintiff] we were going to get hit. If there probably wouldn't have been any vehicles going on 39th Street, I probably would have just drove out in the intersection, because I knew we were going to get smacked.

When Roger Burkey first saw the Royle vehicle, it was approximately at the northern exit of the grocery store parking lot.

Corresponding with Roger Burkey's version of the incident, Vasquez reported that after the collision, Royle told him that "she was southbound on Second Avenue approaching 39th and she couldn't get stopped due to the icy roadway and collided with a vehicle in front of her with the left front portion of her vehicle." Royle also told the officer that "she attempted to steer

to the right but for some reason couldn't." Vasquez testified similarly to Roger Burkey that because the streets were covered with ice and snow, the lane markings were not visible.

Royle's version of the collision is generally to the effect that she and her friends had left Kearney to travel to another town, but decided it was "too icy" and turned around to return to Kearney. When questioned by her attorney on direct examination, she stated:

> As I got to about [the automobile dealership], I could see that there was a red stop light. I could see the Burkey car in the center lane. I was still in the center lane until the first entrance into the [grocery store] parking lot. Sometime in between that entrance and the second entrance I realized that I probably wouldn't be able to stop behind their car. I thought it would be safer to get into the right-hand lane of traffic. There was nothing coming, so I did. I would have been able to stop and not go through the intersection. However, I hit something, I don't know for sure what. It was—it either had to be ice or a clump of snow which caused me to veer to the left, therefore striking the back end of their car.

She further testified that when she reached the northernmost entrance into the parking lot,

> I started tapping my brakes or pumping the brakes. I did feel like I had it under control although we did hit a little ice and again I thought I could probably stop behind the car. But to be safe, it was better to get into the other lane because I did start to slide. If I would not have hit whatever it was that was in the side of the road, I probably would have been able to stop beside them.

When questioned by plaintiff's attorney earlier, during plaintiff's case in chief, Royle stated that she changed lanes because the street began to get icy, and she realized she was not in control of her vehicle and would not be able to stop behind the Burkey vehicle.

Royle testified that she did not see the clump of ice or snow before she hit it. Royle also testified that she began slowing down when she saw the red light. Although she could not recall her exact speed, she was driving "extra cautious" and "slow"

because of the weather conditions, and she did not "fishtail." Royle also contradicted Roger Burkey's and Vasquez' testimony by testifying that she could tell where the lanes should be.

In general, Royle's version of the collision was confirmed by Dave Tietjen, a passenger in her automobile. He testified that she never "fishtailed." He also testified that when the Royle vehicle struck the chunk of ice or snow which caused it to veer left, it was probably traveling at 10 miles per hour, but could have been traveling 5 miles an hour faster or slower. He did state that he could see big chunks of ice and snow along the curb.

According to Royle, the Burkey vehicle was not directly in the center lane of traffic but, instead, impeded the right-hand lane of traffic "a little bit." While she stated that the Burkey vehicle "definitely" narrowed the right-hand lane, she could have gone around it on the right had she not hit the clump of ice or snow. Vasquez testified that after the collision, the position of the Burkey vehicle "seem[ed] to indicate . . . that it was encroaching on the west . . . driving lane." Tietjen stated that Royle's vehicle pushed the Burkey vehicle "a few feet" forward as a result of the collision.

Vasquez testified that when he arrived at the scene of the collision, the Burkey vehicle was in front of the Royle vehicle, both vehicles were facing south, and both were positioned in approximately the center lane. He estimated that the point of impact between the two vehicles was "about 20 feet north of the north curbline of 39th Street."

According to Vasquez, after the collision the front end of the Burkey vehicle was very close to the intersection. Plaintiff remembered that after the collision she was concerned that the front end of their automobile might be hit by 39th Street traffic. Both Royle and Tietjen contradicted the plaintiff, stating that after the collision the Burkey vehicle was not impeding 39th Street traffic.

It is a motorist's duty to use reasonable care to prevent a collision or injury from the operation of a motor vehicle, considering the conditions and circumstances existing on the public street or highway. *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). A motorist must keep a

proper lookout in the direction in which the motorist's vehicle is operated, take notice of conditions on the street or highway traveled, and know what is in front of her or him for a reasonable distance. See, *Converse v. Morse*, 232 Neb. 925, 442 N.W.2d 872 (1989); *Mantz v. Continental Western Ins. Co.*, 228 Neb. 447, 422 N.W.2d 797 (1988); *Prime Inc. v. Younglove Constr. Co., supra.*

To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in the conduct and may vary depending on the circumstances. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988); *Prime Inc. v. Younglove Constr. Co., supra.*

Ordinarily, the question of the defendant's negligence is one of fact for the jury. *Schuster v. Baumfalk*, 229 Neb. 785, 429 N.W.2d 339 (1988). As plaintiff indicates, however, we have held that negligence generally arises as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop her or his vehicle or turn it aside without colliding with an object or obstruction on the street or highway within the operator's range of vision. *Converse v. Morse, supra*; *Kasper v. Carlson*, 232 Neb. 170, 440 N.W.2d 195 (1989); *Prime Inc. v. Younglove Constr. Co., supra.* The range of vision rule is applicable, notwithstanding that a motorist's vision is impaired by atmospheric or weather conditions, such as falling or blowing snow, rain, mist, or fog, *Mantz v. Continental Western Ins. Co., supra*, and *Prime Inc. v. Younglove Constr. Co., supra*, and notwithstanding that a motorist's ability to maneuver the vehicle is impaired by the presence of ice or snow upon the road surface. See, *Vrba v. Kelly*, 198 Neb. 723, 255 N.W.2d 269 (1977); *Newkirk v. Kovanda*, 184 Neb. 127, 165 N.W.2d 576 (1969); *Kuffel v. Kuncl*, 181 Neb. 770, 150 N.W.2d 908 (1967).

An exception to or exoneration from the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and is thus relatively indiscernible. See, *Converse v.*

Morse, supra; *Prime Inc. v. Younglove Constr. Co., supra.*

Therefore, the question resolves itself into whether Royle operated her vehicle in such a manner that she was unable to stop it or turn it aside without colliding with the Burkey automobile, an object on the street within her range of vision, and thus was negligent as a matter of law notwithstanding that her ability to control her vehicle may have been impaired by the presence of ice or snow on the street.

We have said that if the presence of ice or snow upon the road surface is known or should have reasonably been anticipated, the snow and ice are considered conditions rather than intervening causes and thus do not exonerate a motorist from the application of the range of vision rule. See, *Vrba v. Kelly, supra*; *Newkirk v. Kovanda, supra*; *Kuffel v. Kuncl, supra.*

There is nothing in the evidence which excuses Royle from being aware of the conditions and circumstances under which she was driving and from knowing of the presence of the snow or ice she encountered. Accordingly, the trial court erred in failing to instruct the jury as plaintiff requested.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

H.L. JELSMA AND TOMMY JELSMA, DOING BUSINESS AS SPA, INC., APPELLEES, V. ACCEPTANCE INSURANCE COMPANY, APPELLANT.

446 N.W.2d 725

Filed October 13, 1989. No. 88-050.

1. **Reformation: Intent.** The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties. Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument.
2. **Reformation.** Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties.
3. **Reformation: Fraud.** Reformation may be ordered where there has been a

mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party.

4. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that the written instrument correctly expresses the intention of the parties and obtain reformation, the evidence must be clear, convincing, and satisfactory.
5. **Contracts: Insurance: Reformation: Intent.** Reformation of an insurance contract may be granted when through a mistake the policy fails to express the contract intended by the parties.
6. **Contracts: Insurance: Agents: Fraud: Reformation.** Where a mistake of the insurer's agent is relied upon, the same principles governing reformation for mistake generally are applied. Consequently, where a mistake of an agent is relied on, it must be mutual to warrant reformation, or there must be mistake of one party and fraud of the other, for, in the absence of fraud, a unilateral mistake, while it may afford ground for rescinding, does not justify the reforming of the contract.
7. **Reformation: Words and Phrases.** For purposes of reformation, mutual mistake is defined as a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument.
8. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded with directions.

Donn E. Davis, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Hal Bauer, of Bauer, Galter & O'Brien, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The plaintiffs, H.L. Jelsma and Tommy Jelsma, doing business as Spa, Inc., commenced this action for a declaratory judgment to determine whether a policy of fire insurance issued by the defendant, Acceptance Insurance Company, to the plaintiffs was in effect on July 29, 1986, the date that the plaintiffs' property was destroyed by fire, or whether the policy had been canceled prior to the loss.

The trial court found that it was the intent of the parties that the policy be issued for the period of time from September 10, 1985, through September 10, 1986; that the notice of cancellation sent to the plaintiffs was ineffective; and that the policy was in effect on July 29, 1986. The defendant has appealed, alleging as error these three findings of the district court.

The record shows that the plaintiffs were represented in the transaction by Alexander & Alexander, Inc., and the defendant by River City Underwriters, Inc. Prior to September 10, 1985, the plaintiffs contacted Alexander & Alexander, seeking renewal of fire insurance coverage for their property known as the Royal Grove. Alexander & Alexander then requested coverage through River City Underwriters, a managing general agent for Acceptance. River City Underwriters arranged for coverage by six insurers, one of which was Acceptance. The term of each policy issued was for a year, from September 10, 1985, through September 10, 1986, except the Acceptance policy, which had a term from September 10, 1985, through May 4, 1986.

Since the policy issued by the defendant was effective only from September 10, 1985, through May 4, 1986, the policy would not be in effect on July 29, 1986, unless it was subject to being reformed. Thus, in effect, this action was a suit in equity by the plaintiffs to reform the insurance policy which the defendant had issued. See *First Fed. Sav. & Loan Assn. v. Thomas*, 230 Neb. 465, 432 N.W.2d 222 (1988).

This court reviews actions in equity de novo on the record and is required to reach a conclusion independent of the trial court's findings; however, subject to the rule that where credible evidence is conflicting on material issues of fact, this court may consider the fact that the trial court observed the witnesses and accepted one version of facts over the other. *Id.*

The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties. Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument. In *Newton v. Brown*, 222 Neb. 605, 612, 386 N.W.2d 424, 429 (1986), we stated:

> Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties.

Reformation may be ordered where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party. *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985). To overcome the presumption that the written instrument correctly expresses the intention of the parties and obtain reformation, the evidence must be clear, convincing, and satisfactory. *Id.*

Reformation of an insurance contract may be granted when through a mistake by the insurer's agent the policy fails to express the contract as intended by the parties.

> Where the mistake of the insurer's agent is relied upon, the same principles governing reformation for mistake generally are applied. Consequently where a mistake of an agent is relied on, it must be mutual to warrant reformation, or there must be mistake of one party and fraud of the other, for, in the absence of fraud, a unilateral mistake, while it may afford ground for rescinding, does not justify the reforming of the contract.

17 G. Couch, Cyclopedia of Insurance Law § 66:43 (rev. 2d ed. 1983).

> For purposes of reformation, mutual mistake is defined as a belief shared by the parties, which is not in accord with the facts. . . . A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. . . . "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties."

Newton, supra at 613, 386 N.W.2d at 430, quoting *Sierra*

Blanca Sales Co., Inc. v. Newco Industries, Inc., 84 N.M. 524, 505 P.2d 867 (1972).

The record shows that the Acceptance policy, which was effective from September 10, 1985, through May 4, 1986, was not written until April 29, 1986. The policy was written then because Thomas Harper, a River City Underwriters employee who had handled the matter prior to April 1986, had failed to obtain a policy from Lloyd's of London. On April 22, 1986, Michael J. Mertz, an underwriter at River City Underwriters, discovered that Harper had not obtained the policy from Lloyd's which would cover $95,000, or 16 percent of the risk. Mertz then arranged for the defendant to issue a short-term policy covering the period from September 10, 1985, to May 4, 1986. The notice of cancellation which was sent to the plaintiffs was intended to advise them that they had no coverage under the defendant's policy after May 4, 1986.

The record further shows that the defendant had issued a similar policy to the plaintiffs in a prior year, but had canceled that policy because it considered the risk substandard. Mertz testified that if the risk had come to his attention at the time it was originally submitted, it would have been declined by the defendant. There is a complete absence of evidence of mistake or fraud on the part of the defendant concerning its intention to write a policy extending beyond May 4, 1986.

There is no evidence that Acceptance intended the policy to be for a term of 1 year from September 10, 1985, to September 10, 1986. Although the Jelsmas intended to obtain a policy for 1 year, Acceptance declined to provide such coverage because the risk did not meet its underwriting standards. Only when River City Underwriters discovered that coverage had not been placed with Lloyd's of London did Acceptance agree to furnish coverage on a short-term basis as an accommodation.

The record further shows that the plaintiffs were aware of a lack of full coverage on their property after several other carriers had canceled policies issued to the plaintiffs. Although Alexander & Alexander was able to obtain additional coverage for the plaintiffs, they decided not to obtain new policies because of the increase in premiums that they would have to pay.

It is unnecessary to consider the other assignments of error.

The judgment is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

NOGG BROTHERS PAPER CO., A NEBRASKA CORPORATION, APPELLEE, V. WILLIAM J. BICKELS, APPELLANT.

446 N.W.2d 729

Filed October 13, 1989. No. 88-127.

1. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
2. **Contracts: Intent.** A written contract expressed in unambiguous language is not subject to rules of construction, and the intention of the parties must be determined from the contents of the contract.
3. **Contracts.** The fact that there exist more than one arguable interpretation of a contract term does not necessarily indicate that it is ambiguous.
4. **Contracts: Intent.** A contract is only ambiguous if, upon considering the contract as a whole, the contract leaves uncertain which of two or more meanings represents the true intentions of the parties.

Appeal from the District Court for Douglas County, THEODORE L. CARLSON, Judge, on appeal thereto from the County Court for Douglas County, WILLIAM F. RYAN, Judge. Judgment of District Court affirmed.

Daniel W. Evans, of Steier & Kreikemeier, P.C., for appellant.

Eric H. Lindquist, of Abrahams, Kaslow & Cassman, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This action was brought in the county court for Douglas County by the plaintiff-appellee, Nogg Brothers Paper Co. (Nogg), on a personal guaranty executed by the defendant-appellant, William J. Bickels. The county court

found in favor of defendant Bickels. Nogg appealed to the district court for Douglas County, where the county court decision was reversed and judgment entered for Nogg. Bickels appealed to this court. We affirm.

The facts of the case were stipulated at trial and show the following. Defendant was president and part owner of Bill & Buck, Inc., doing business as Bic's Deli Mart (Bic's). Bic's applied to Nogg for a credit account. As part of the application and pursuant to the specific demand of Nogg, Bickels executed a document provided by Nogg entitled "Individual Personal Guaranty." The guaranty stated:

> I, William Bickels . . . for and in consideration of your extending credit at my request to Bic's Deli Mart (hereinafter referred to as the "Company"), of which I am President, hereby personally guarantee to you the payment at NOGG BROTHERS PAPER COMPANY in the State of NEBRASKA of any obligation of the Company and I hereby agree to bind myself to pay you on demand any sum which may become due to you by the Company whenever the Company shall fail to pay the same. It is understood that this guaranty shall be a continuing and irrevocable guaranty and indemnity for such indebtedness of the Company. I do hereby waive notice of default, non-payment and notice thereof and consent to any modification or renewal of the credit agreement hereby guaranteed.

Nogg did not send Bickels any documents purporting to accept the guaranty.

Nogg granted credit and delivered goods and services to Bic's in the amount of $4,424.05. Nogg demanded payment from Bic's and Bickels. Both refused to pay. Nogg did not pursue its remedies against Bic's, but initiated this action against Bickels.

The county court found that Bickels' guaranty was conditioned upon Nogg's exhaustion of its remedies against Bic's, thus finding that the guaranty was a guaranty of collection. Because Nogg had failed to exhaust its remedies against Bic's, the county court dismissed the cause without prejudice. Nogg appealed to the district court for Douglas County. Bickels cross-appealed, assigning error in the county

court's action dismissing the cause without prejudice. The district court reversed the decision of the county court and gave judgment in favor of Nogg in the amount of $4,424.05 plus costs.

Bickels appeals to this court and assigns, in substance, that the district court erred (1) in reversing the county court's determination that Bickels' guaranty was conditioned on Nogg's exhaustion of its remedies against Bic's, (2) in failing to require notice of acceptance to validate the guaranty, and (3) in not dismissing plaintiff's case with prejudice.

Both parties agree that the issue raised by the first assignment is whether the guaranty created a guaranty of payment or a guaranty of collection. Under a guaranty of payment the guarantor undertakes that if the obligation is not paid when due, the guarantor will pay it according to its terms without regard to whether the guaranteed person has exhausted all remedies against the primary debtor. See, *First Nat. Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 402 N.W.2d 259 (1987); *Bain v. King*, 128 Neb. 682, 259 N.W. 751 (1935); *Bloom v. Warder*, 13 Neb. 476, 14 N.W. 395 (1882); Neb. U.C.C. § 3-416(1) (Reissue 1980) (defining guaranty of payment with reference to negotiable instruments). In contrast, under a guaranty of collection the guarantor undertakes the obligation to pay only after the guaranteed person has unsuccessfully exhausted all reasonable means of collection against the primary debtor. See, *McCague Bros. v. Irey*, 73 Neb. 602, 103 N.W. 281 (1905); § 3-416(2) (defining guaranty of collection with reference to negotiable instruments).

A guaranty is interpreted using the same general rules as are used for other contracts. *Aetna Life Ins. Co. v. Anderson*, 848 F.2d 104 (8th Cir. 1988). Cf. *First Trust Co. v. Airedale Ranch & Cattle Co.*, 136 Neb. 521, 286 N.W. 766 (1939). A written contract expressed in unambiguous language is not subject to rules of construction, and the intention of the parties must be determined from the contents of the contract. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). The fact that there exist more than one arguable interpretation of a contract term does not necessarily indicate that it is ambiguous. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988). A

contract is only ambiguous if, upon considering the contract as a whole, the contract leaves uncertain which of two or more meanings represents the true intentions of the parties. *Id.*

There is no ambiguity in the guaranty that Bickels signed. Bickels stated in the guaranty, "I . . . personally guarantee to you the payment" of Bic's obligations to Nogg "whenever [Bic's] shall fail to pay the same." Bickels contends that the phrase "shall fail to pay" in the guaranty is ambiguous because it is unclear whether the phrase refers to failure to pay upon demand or failure to pay after judgment and unsatisfied execution. The ordinary and plain meaning of the phrase "fail to pay" is failure to pay at maturity or demand and not upon judgment and unsatisfied execution, as argued by Bickels.

Where a guaranty uses unqualified language of payment, it has historically been interpreted to guarantee the payment of the underlying obligation upon maturity. The term "shall fail to pay," as used in the guaranty, is not an added condition to Bickels' guaranty of payment to Nogg and is not indicative of a guaranty of collection. In *Murphy v. Stuart Fertilizer Co.*, 221 Neb. 767, 770-71, 380 N.W.2d 631, 634 (1986), we held that a guaranty which stated, " 'We hereby guarantee the payments as set-forth in this Agreement . . .' " was a guaranty which "contained no conditions and as such obligated [the guarantors] to make payment if [the primary debtor] failed to do so." In *Murphy* the very definition of an unconditional guaranty was that the guarantors were obligated to pay upon the primary debtor's failure to pay. A guaranty is considered unconditional even though no liability arises until maturity. Use of the unqualified phrase "fail to pay" is merely a reference to that fact.

Moreover, our law with respect to negotiable instruments has long determined that the unqualified use of language of payment in a guaranty creates an obligation upon maturity. See *International Harvester Co. v. Schultz*, 102 Neb. 753, 169 N.W. 428 (1918) (holding the language " 'For value received, I hereby guarantee the payment of the within note . . .' " (syllabus of the court) did not require the guaranteed person to undertake the collection of the notes from the makers thereof). Article 3 of the Nebraska Uniform Commercial Code has

codified this common-law rule. Although not controlling in this action because we are not here concerned with a negotiable instrument, § 3-416(1) and (3) mandate that a guaranty which uses the language "payment guaranteed" or its equivalent, or does not otherwise specify its nature, will be considered a guaranty of payment. As set out in the comment to § 3-416, the definitions contained in that section reflect "the commercial understanding as to the meaning and effect of words of guaranty . . . ." The law with respect to instruments indicates that commercial usage, as well as common usage, views language of "payment" in a guaranty as creating liability upon maturity and not upon judgment and unsatisfied execution.

The following example clarifies the difficulty with Bickels' proposed interpretation of the term "fail to pay." In *Mayo v. Bloomberg*, 290 Mass. 168, 195 N.E. 99 (1935), the defendant guaranteed payment to the plaintiffs if the primary debtor failed to pay the obligation within 10 days of maturity. If one would follow Bickels' proposed interpretation of the phrase "fail to pay," the guaranty in the *Mayo* case would mean that the defendant was only obligated to pay the plaintiffs if the plaintiffs were able to obtain a judgment against the primary debtor and have execution returned unsatisfied within 10 days of maturity. The primary debtor would have "failed to pay" only if the plaintiffs were unable to obtain judgment and have execution returned unsatisfied within 10 days of maturity. Bickels' interpretation would reduce the *Mayo* guaranty to a nullity, contrary to the objective intent of the parties. The court in *Mayo* held that the guaranty was an unconditional guaranty of payment.

Next, Bickels contends that by including the word "indemnity" in the guaranty Nogg limited the guaranty to one of collection. Even though a cause of action for a contract of indemnity does not accrue until a loss occurs, *Lyhane v. Durtschi*, 144 Neb. 256, 13 N.W.2d 130 (1944), the mere inclusion of the word "indemnity" in a contract does not by itself control the conditions of liability or create ambiguity. We held in *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 161, 281 N.W.2d 539, 542 (1979), that "in construing a contract, the instrument must be read as a whole, giving force

and effect to all its provisions to determine whether or not any ambiguity exists . . . ." The guaranty in this case, viewed as a whole, uses language of "payment," as discussed above. The indemnity language is merely cumulative language within the guaranty and can be given effect without limiting the guaranty or making it ambiguous.

The language of the guaranty, taken as a whole, indicates an objective intention of the parties to execute a guaranty of payment. Upon considering the guaranty with a view to its plain and ordinary language, there do not remain two or more meanings which could represent the true intent of the parties.

In arguing that the guaranty must be construed as a guaranty of collection, Bickels relies on the rule of construction stated in *Metropolitan Utilities Dist. v. Fidelity & Deposit Co.*, 200 Neb. 635, 640, 264 N.W.2d 854, 857 (1978), that "[i]f an obligee in a guaranty draws it in a form requiring explanation, the guarantor is a favorite of the law in the interpretation of the ambiguous provision." A contract written in unambiguous language is not open to construction against the drafter or otherwise. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988); *Cillessen Constr. v. Scotts Bluff Co. Hous. Auth.*, 217 Neb. 39, 348 N.W.2d 418 (1984). There is no ambiguity in the guaranty, and therefore, there is no reason to consider the rules of construction relied upon by the defendant.

Because we hold that the guaranty executed by Bickels was an unconditional guaranty of payment, we need not consider the second and third assignments of error. Bickels concedes under the second assignment that under Nebraska law no notice of acceptance is required for a guaranty of payment. See, *Standard Oil Co. v. Hoese*, 57 Neb. 665, 78 N.W. 292 (1899); *Lininger v. Wheat*, 49 Neb. 567, 68 N.W. 941 (1896); *Wilcox v. Draper*, 12 Neb. 138, 10 N.W. 579 (1881). The third assignment, that the trial court erred in not dismissing the cause with prejudice, is not in issue because we affirm the district court's determination that the cause should not have been dismissed at all.

The judgment of the district court is affirmed.

AFFIRMED.

HORST WOELLNER, APPELLEE, V. ERNA WOELLNER, APPELLANT.
446 N.W.2d 733

Filed October 13, 1989. No. 88-151.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Thomas R. Wolff for appellant.

Howard L. Neuhaus for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is an appeal from the Douglas County District Court, which denied the application of the respondent-appellant to modify the divorce decree by extending the period of alimony payments indefinitely.

As required, we have reviewed the trial court's action de novo on the record. *Bending v. Bending, ante* p. 506, 446 N.W.2d 236 (1989). From that review, we determine that the trial court did not abuse its discretion in denying the application of appellant to extend the period of alimony payments indefinitely. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE OTIS MARSHALL, APPELLANT.
446 N.W.2d 733

Filed October 13, 1989. No. 88-558.

1. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including the credibility and weight to be given the testimony of a witness.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to receive a further review of issues already litigated.

3. **Effectiveness of Counsel: Proof.** To maintain a claim of ineffective assistance of counsel, defendant must show counsel's performance was deficient and that the deficiency prejudiced defendant.
4. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is not entitled to relief.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Defendant, Lee Otis Marshall, appeals from a May 26, 1988, order of the district court for Lancaster County denying his motion for postconviction relief.

The record shows the following. On October 4, 1977, in Lancaster County, defendant entered pleas of not guilty and not guilty by reason of insanity to the charge of first degree murder in the killing of Wilson Eugene Field IV while in the perpetration of a robbery on August 11, 1977. On January 16, 1978, defendant and his counsel appeared before a judge of the district court for Lancaster County for the stated purpose of withdrawing his pleas. Defendant informed the court that he, the defendant, had called a lawyer friend in Phoenix, who had advised the defendant to request a conference with the defendant, his lawyer, the prosecuting attorney, and the court. The court told defendant that defendant was free to talk to his attorney and free to confer with his attorney and the prosecuting attorney, but that the court would not engage, as a judge, in any such conference. Defendant requested more time "to talk with [his] lawyer," and the court continued the hearing until 4:30 p.m. the next day.

On January 17, 1978, defendant and his counsel, together with the Lancaster County chief deputy county attorney, again

appeared before the court. Defendant and his counsel asked leave to withdraw defendant's previous pleas of not guilty and not guilty by reason of insanity. After inquiries directed to the defendant, the court granted leave to defendant to withdraw his previous pleas, and the hearing then proceeded to rearraignment.

The deputy county attorney again read the information to defendant. At the court's request, the deputy county attorney and defendant's counsel set out the plea agreement between the State and defendant. That agreement was that if the defendant pled no contest to the charge, the State would recommend to the court that defendant not receive the death sentence because the State felt that "when the Court sees all of the evidence relevant to the offense and the defendant's situation, that it is likely to find that the mitigating circumstances outweigh any aggravating circumstances." There was a further agreement that if the court did not accept the State's recommendation, defendant would be permitted to withdraw his plea and the case would proceed to trial.

The court then explained to defendant the meaning of a no contest plea. Defendant then stated to the court, "They got down [in the information] 'in the perpetration of a robbery.' Well, I'm not denying that I didn't [sic] kill him, but I am denying I wasn't [sic] robbing the man." When asked what the plea of no contest meant to him, defendant stated to the court, "My understanding is that I'm not pleading not guilty but I can't contest against the State's evidence and that anyway, after a trial, most likely that I would be found guilty anyway."

The court then reexplained, in detail, the meaning of a no contest plea, and defendant's questions were answered by the court. The court then requested the deputy county attorney to state a factual basis for the proposed plea. The attorney was sworn and stated that the State's evidence would show that defendant and his girlfriend, Bonnie Brooks, had broken off their relationship on August 9, 1977, after Brooks told defendant she did not wish to see him any more. Defendant apparently lost his temper and damaged the Brooks house. On the morning of August 11, defendant talked to a female acquaintance who was a worker at an employment service in the

YMCA building in Lincoln. This worker saw that defendant was carrying a concealed object in his pant leg. During their conversation, defendant told the worker that she would not see him again and that he was going to rob a store. The deputy county attorney stated that the other evidence would show that in the afternoon of August 11, defendant went to the residence of Brooks, threw $100 in cash on a table, and said this was to pay for the damage he had done to the Brooks house.

Other evidence would show that defendant had been hired a few days before August 11, 1977, by Field, who owned and operated a floral shop at 48th and Calvert Streets in Lincoln. In the afternoon of August 11, defendant drove a car belonging to Field's Floral Shop into the Lancaster County sheriff's garage, where he immediately volunteered to a deputy sheriff that defendant had just "clubbed" his boss, Field, and that he was sure the man was dead. Defendant was advised of his *Miranda* rights and later, at the Lincoln police station, gave the following answers to questions addressed to him:

> [Q:] Okay, going back to what occurred in the florist shop, did you come up from behind the man that owned the flower shop?
>
> [A]: Yeah.
>
> [Q]: Do you think he even saw you?
>
> [A]: He didn't see me, when I hit him he turned around and started screaming and I just wanted to hit him once right then and knock him out and I didn't want to kill him.
>
> [Q]: Okay, how many times did you hit him?
>
> [A]: Three or four times.
>
> [Q]: Three or four times?
>
> [A]: I just hit him until he stopped screaming, that's all.
>
> . . .

Field was found that afternoon at the floral shop, covered with blood, but still conscious. He died the following morning at Bryan Memorial Hospital of injuries resulting from numerous blows to the head. A metal bar approximately 18 inches long was found lying on the counter of the store near the cash register. All the cash, consisting of approximately $100, was missing from the register.

In response to a question from the court, defendant's counsel

advised the court that defendant had been seen on three occasions by a psychiatrist selected by defense counsel and that in the opinion of the psychiatrist, defendant was competent to stand trial and had no mental illness that would prevent defendant from fully understanding the plea he was making.

After defendant's plea of no contest, the court stated:

> All right. On the basis of the proceedings and testimony this afternoon, the Court finds that the plea is freely and voluntarily made, with full realization of the consequences, after full and fair opportunity for consultation with counsel, that the plea was made at a time when the defendant was free of any affects [sic] of drugs or intoxicants, that he was, according to the representation of his counsel as to previous mental examinations, that he is not only competent at this time, but at the time of the offense, that the facts tendered by the State through the testimony of Mr. McGinn support a finding of guilty.

Throughout the rearraignment, defendant stated he understood all that was said by the deputy county attorney. Before the court accepted defendant's plea, the trial court meticulously explained to defendant all of the constitutional rights in an arraignment that completely complied with our later holding in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The court determined that defendant understood those rights and held defendant's plea was free and voluntary.

After a presentence investigation, the court sentenced defendant to life imprisonment. Defendant appealed the sentence. Counsel representing defendant at that time determined that the appeal was frivolous and filed a motion and brief seeking to withdraw from the case following the procedure set out in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). The motion to withdraw was granted and defendant's sentence affirmed by this court in *State v. Marshall* (case No. 42071, June 19, 1978).

No further appeals were taken until October 7, 1987, when defendant filed a pro se motion to vacate his sentence pursuant to Nebraska's Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). The trial court denied a hearing on all but

2 of the 20 allegations because the files and records of the case showed to the court's satisfaction that defendant was not entitled to relief on those grounds.

The court did grant an evidentiary hearing on two allegations and appointed counsel to represent defendant at that hearing and on this appeal. Those allegations were set out in paragraphs 8 and 12 of defendant's pro se motion and alleged that defendant's counsel was ineffective in not objecting to the deputy county attorney's negotiating with defendant in the absence of defendant's counsel. A hearing was held on those allegations. Following the hearing the trial court found that defendant's trial counsel was not ineffective; that no representative of the Lancaster County Attorney's office had ever discussed the then pending case with defendant in the absence of defendant's counsel; that defendant's plea of January 17, 1978, was made freely, voluntarily, and intelligently; that defendant was not entitled to relief based on his allegations in paragraphs 8 and 12 of his motion; and that the files and records of the case showed that defendant was not entitled to a hearing or relief on the other allegations of his motion. The court denied defendant's motion for postconviction relief.

Defendant timely appealed, assigning four errors, which can be consolidated into two. Defendant contends that the trial court erred (1) in denying his motion for postconviction relief on the matters considered at the evidentiary hearing and (2) in denying an evidentiary hearing on the other matters raised in the motion. We affirm.

With respect to the first assignment of error, an evidentiary hearing was held on May 23, 1988, concerning defendant's allegation that his plea was involuntary because his counsel was ineffective in failing to object to the deputy county attorney's action in negotiating with defendant in the absence of defendant's counsel. Defendant testified that he pled no contest because he was under duress resulting from pressure by the deputy county attorney in talking to and threatening defendant when defendant's counsel was not present, and that defendant's counsel knew of such improper conduct. Defendant's only evidence that such threats were made was his own testimony. He

testified that on January 16, 1978, the deputy county attorney told him, outside defendant's counsel's presence, that the State would seek imposition of the death penalty if defendant did not plead guilty to the felony murder charge.

Defendant's counsel testified that he knew of no such improper conduct and that he met with defendant the evening of January 16, and defendant did not mention the conversation he allegedly had earlier that evening with the deputy county attorney. The deputy county attorney testified that at no time did he meet with or speak to defendant outside the presence of defendant's counsel.

In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including the credibility and weight to be given the testimony of a witness, and the trial court's findings will be upheld unless the findings are clearly erroneous. *State v. Wiley*, 232 Neb. 642, 441 N.W.2d 629 (1989). The trial court found that no "member or representative of the County Attorney's Office ever had any . . . discussions . . . with defendant outside the presence of defense counsel." In light of the above testimony, we cannot say that the trial court's evidentiary findings are clearly erroneous, and we determine that the evidence fully supports the court's findings. Defendant's first assignment of error is without merit.

Defendant's second assignment of error concerns the allegations made in his motion on which no evidentiary hearing was held. Defendant contends that an evidentiary hearing should have been granted on the other allegations, all of which concerned the voluntariness of defendant's plea or the effectiveness of his counsel.

While defendant makes the general allegation that the trial court erred in not granting an evidentiary hearing on all the allegations in his postconviction motion, his brief specifically discusses only some of those allegations.

At page 10 of his brief, defendant states, "The record shows no order for examination of Appellant by psychiatrists to determine his competency either for trial or to enter any plea." It is clear that the court did not order any psychiatric examination to determine defendant's competency for trial or

to plead, but it is equally clear that at the time of defendant's plea on January 17, 1978, defendant's counsel specifically informed the court that defendant had been examined on three occasions by a practicing psychiatrist in Lincoln, chosen by defendant's counsel, and the conclusion of that doctor was that defendant "is not incompetent to stand trial, that he is not in any way mentally deficient, has no mental illness which would prevent him from knowing and understanding the things he intends to do." Defendant stated on the record that he agreed with the conclusion of that doctor. The fact that the court did not order evaluations which were made is of absolutely no consequence.

At the time of the rearraignment the court was not aware of the previous psychiatric examinations of defendant, and the court had arranged for an examination of defendant by another psychiatrist. That examination was conducted on January 23, 1978. The report of that examination was included in the defendant's presentence investigation and was available to both the court and defendant before sentencing in the case. After examination, the second psychiatrist found that "[t]he subject [defendant], in my opinion, is legally competent to stand trial and was legally sane at the time of the commission of his offense." Defendant's contentions on this point are frivolous.

Defendant also contends that his plea was not freely given but, instead, was the result of coercion by the court as an active participant in plea negotiations taking place in open court. Our examination of the 56-page arraignment and rearraignment of defendant shows that the original trial court scrupulously protected all the constitutional rights of defendant and fully explained all those rights to defendant. The record is clear that the original court did not coerce defendant in any way. The evidence that defendant's plea was free and voluntary is without any contradiction in the record before us.

Defendant specifically contends that an evidentiary hearing should have been granted because of the ineffectiveness of counsel because counsel (1) failed to obtain a determination of his competency to stand trial or to enter a plea, (2) improperly advised him to enter a plea contrary to his desire for a jury trial, and (3) failed to represent him on direct appeal.

To maintain a claim of ineffective assistance of counsel, defendant must show counsel's performance was deficient and that the deficiency prejudiced defendant. *State v. Bostwick, ante* p. 57, 443 N.W.2d 885 (1989); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

As shown above, defendant's counsel had defendant examined three times before defendant's plea on January 17, 1978. Defendant's statement that his counsel "failed to obtain a determination of his competency" is an absolute misstatement of fact. The bill of exceptions further shows that counsel's advice was not contrary to defendant's wishes. There is nothing in the record to substantiate defendant's claim that he sought to exercise his right to a jury trial. The record shows that counsel acted competently in advising defendant to negotiate a plea, given the facts of the case. Those facts showed that the evidence against defendant was overwhelming. A plea will be found to be freely and voluntarily entered upon the advice of counsel if the advice was within the range of competence demanded of attorneys in criminal cases. *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989).

Defendant's argument that counsel improperly withdrew from the case is also without merit. Counsel's withdrawal was considered and granted by this court in *State v. Marshall* (case No. 42071, June 19, 1978). That question is entitled no further review.

All of the allegations in defendant's postconviction motion have been examined, and none have merit. An evidentiary hearing may be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989). See, also, *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988). The files and records show that defendant received effective counsel and that defendant's plea was voluntary and made after a proper arraignment.

The trial court did not err in refusing to grant an evidentiary hearing on all of the issues raised in defendant's motion for postconviction relief, and the trial court did not err in refusing to grant relief on the two issues submitted at the hearing.

The judgment of the district court is affirmed.

AFFIRMED.

LOIS LAPAGE, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.

446 N.W.2d 738

Filed October 13, 1989. No. 89-013.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James D. Faimon, Assistant Lincoln City Attorney, for appellant.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

On rehearing, the Nebraska Workers' Compensation Court entered an award for Lois LaPage concerning her injuries sustained as the result of accidents arising out of and in the course of LaPage's employment with the City of Lincoln. The city appeals and claims that the 2-year statute of limitations, see Neb. Rev. Stat. § 48-137 (Reissue 1988), bars recovery by LaPage.

> " 'Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. [Citations omitted.] In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. [Citations omitted.] Factual determinations by the Workers' Compensation Court will not be set aside on

> appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. [Citations omitted.] As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.' "

Osborne v. Buck's Moving & Storage, 232 Neb. 752, 752-53, 441 N.W.2d 906, 906-07 (1989). See *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988). See, also, Neb. Rev. Stat. § 48-185 (Reissue 1988).

"A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense." *League v. Vanice*, 221 Neb. 34, 42, 374 N.W.2d 849, 854 (1985). Determination of causation is, ordinarily, a matter for the fact finder. *Fees v. Rivett Lumber Co., supra.*

The record supplies sufficient evidence to sustain the factual disposition of the question concerning the statute of limitations and supports the award by the Workers' Compensation Court. Finding no clear error regarding the award, we affirm the judgment of the Workers' Compensation Court.

As authorized by Neb. Rev. Stat. § 48-125(1) (Reissue 1988), we award LaPage an attorney fee of $750 for her lawyer's services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JULIE L. TOMLINSON, APPELLANT.
446 N.W.2d 740

Filed October 13, 1989. No. 89-086.

Ordinances: Presumptions: Appeal and Error. Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged.

Appeal from the District Court for Douglas County, JERRY M. GITNICK, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Judgment of District Court affirmed.

Donald W. Kleine, of Kleine Law Office, for appellant.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Julie L. Tomlinson appeals from the district court for Douglas County, which affirmed the conviction and sentence of the county court for Douglas County. After a bench trial, the county court found appellant guilty of prostitution in violation of Omaha Mun. Code, ch. 20, art. V, § 20-132 (1980), and ordered her to pay a fine of $75.

Appellant's sole assignment of error is the trial court's finding beyond a reasonable doubt that appellant practiced an indiscriminate sex act expressly for compensation.

The record shows the following. On August 31, 1988, Brian Smith, a vice officer with the Omaha Police Division, went to the Tub & Tan massage parlor at 7644 Pierce Street in Omaha to investigate alleged prostitution activity occurring there. Smith had called the night before and set up an appointment for a massage.

Officer Smith arrived at the Tub & Tan at approximately 12:30 p.m., where he was subsequently let inside the premises by the appellant. The appellant then presented Smith with a list of massage services offered and their respective prices. The list

also stated that there was a $10 first-time membership fee. Smith gave appellant $50 ($40 for a massage, plus the $10 membership fee), whereupon appellant directed Smith to a room and told him that he should undress and that he could take a whirlpool bath, which he did. Appellant then led Smith, now with a towel around his waist, into a room with a massage table, where she instructed him to take the towel off and lie on his stomach, which he did.

Appellant proceeded to massage Officer Smith's back side and then told him to turn over and lie on his back. Officer Smith complied, and appellant massaged his feet, legs, and chest. She then proceeded to his genital area, and, as Smith testified, "She placed a towel on my stomach, and then poured oil on my penis, and began stroking it." Smith then told appellant to stop, and she immediately did.

Smith then dressed, tipped appellant $10, and left the establishment. He met with two other police officers, Cyronek and Clark, and advised them of the events in the massage parlor. All three officers then went back to the Tub & Tan and served appellant with a citation for the offense of lewd conduct. Smith testified that appellant asked why she was being cited, and Officer Cyronek stated, "You had poured oil on his penis and were stroking him," to which appellant replied, "That's part of the massage."

The issue in this case is whether appellant did unlawfully, purposefully, or knowingly engage or agree to engage in an act of prostitution. Appellant argues that there was no agreement to exchange money for a sex act. There was certainly an exchange of money for a service (the massage). Appellant freely admitted in response to Officer Cyronek's explanation of the citation that her genital manipulation of Officer Smith was "part of the massage." Appellant therefore purposely and knowingly performed this act as part of the services she offers in exchange for money.

What remains is a determination of whether this act constituted a sex act and amounted to prostitution under the prosecuted ordinance; however, that ordinance has not been made part of the record and is therefore not before this court. We have held that where an ordinance charging an offense is not

properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, and that in the absence of the applicable municipal ordinances from the record, we must presume the evidence sustained the findings and the sentences were within the limits as set in the ordinances. *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987).

The district court reviewed the record of the county court in making its determination that the conviction and sentence of the county court should be affirmed. We agree. The order of the district court affirming the judgment and sentence of the county court is affirmed.

AFFIRMED.

HENRY J. SCHMID, JR., APPELLEE AND CROSS-APPELLANT, V. MALCOLM SCHOOL DISTRICT, A NEBRASKA POLITICAL SUBDIVISION, APPELLANT AND CROSS-APPELLEE.

447 N.W.2d 20

Filed October 20, 1989. No. 87-483.

1. **Appeal and Error.** Findings of fact of the trial court will not be reversed on appeal unless clearly wrong.
2. _____. In reviewing the findings of the trial court, we presume the court resolved any controverted facts in favor of the successful party, and we will consider the evidence and permissible inferences therefrom most favorably to that party.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Alan L. Plessman for appellant.

Joseph K. Meusey, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from a judgment of the district court for Lancaster County in favor of Henry J. Schmid, Jr., plaintiff-appellee, in his negligence action against Malcolm School District, defendant-appellant.

Schmid sustained personal injuries when his vehicle collided with a Malcolm School District schoolbus. The district stipulated that it was negligent, through its employee, and that its negligence was the sole proximate cause of appellee's injuries. Trial was had on the issue of damages. The trial court found the damages to be $25,000 and entered judgment in that amount in favor of Schmid. The district did not file a motion for new trial, but timely appealed from the judgment.

The district assigns error in the trial court's action in finding the evidence was sufficient to support its judgment. In support of its sole assignment of error, the district contends that Schmid failed to submit any evidence of compliance with the Political Subdivisions Tort Claims Act, then Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), now Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987) (hereinafter referred to as the Tort Claims Act or the Act). The district's contention is without merit, and we affirm the judgment of the trial court.

The determination of compliance with the Tort Claims Act is a factual determination. The findings of fact of the trial court will not be reversed on appeal unless clearly wrong. *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988). In reviewing the findings of the trial court, we presume the court resolved any controverted facts in favor of the successful party, and we will consider the evidence and permissible inferences therefrom most favorably to that party. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

The trial court had before it a record of Schmid's compliance with the Tort Claims Act. Although Schmid did not submit evidence of compliance with the Tort Claims Act at trial, the district's answer admitted that the negligence action was brought "pursuant to" the Tort Claims Act. In paragraph II of his petition, Schmid alleged, "This action is brought pursuant to the Political Subdivisions Tort Claims Act as enacted by the

State of Nebraska, Neb. Rev. Stat. §§ 23-2401 to -2420 (1983 & Cum.Supp. 1984)." In paragraph 1 of its answer, the district specifically admitted the allegation contained in paragraph II of the petition. As we stated in *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 322, 343 N.W.2d 903, 906 (1984), "Admissions contained in a defendant's answer are judicial in nature and waive all controversy concerning the matter." We presume the trial court relied on this admission in entering judgment in favor of Schmid. The issue is whether, considering the admission and permissible inferences therefrom most favorably to Schmid, the trial court was clearly wrong in inferring from the answer that the district admitted Schmid's compliance with the Tort Claims Act. The petition stated that the action was brought "pursuant to" the Tort Claims Act. Webster's Third New International Dictionary, Unabridged 1848 (1981), defines "pursuant to" as "in the course of carrying out: in conformance to or agreement with: according to." Under the circumstances, the trial court could reasonably infer that an admission that the action was brought "pursuant to" the Tort Claims Act was an admission that it was brought in complete "conformity" with the Tort Claims Act.

This inference of conformity or compliance is particularly compelling when the phrase "pursuant to" is used with reference to the Tort Claims Act, which is procedural in nature. The Tort Claims Act is not part of Schmid's cause of action in negligence, but sets out the procedural means through which the district waives its sovereign immunity. Without compliance with the procedural requirements of the Tort Claims Act, the political subdivision's sovereign immunity applies, and not the Tort Claims Act. A plaintiff who sues a political subdivision for negligence and has not complied with the procedures in the Tort Claims Act could not be said to have properly brought an action pursuant to the Act, because it would not apply.

Arguably, a statement that an action was brought pursuant to the Tort Claims Act could be interpreted as referring only to the fact that the Act is relevant to the action, but that does not mean under these circumstances that the court erred in inferring that the admission referred to complete compliance. The district, which was well aware of the procedural conditions to

bringing tort actions against it, never challenged compliance with the Act either by summary judgment, motion for a directed verdict, motion for a new trial, or otherwise. We are not holding that the phrase "pursuant to" necessarily implies complete conformity, but, rather, we hold that in considering the admission and the inferences therefrom, in this case, in a light most favorably to Schmid, the trial court was not clearly wrong in finding that the district's admission that the action was brought pursuant to the Tort Claims Act was sufficient record of compliance with the Act. The judgment of the trial court is affirmed.

Appellee's cross-appeal "for attorneys' fees and expenses incurred as a result of Appellant's appeal to the Nebraska Supreme Court" is not a cross-appeal, but a motion seeking fees in this court. Fees can be awarded in this court if the appeal is frivolous. Under the circumstances of this case, we do not feel the appeal can be considered frivolous. Appellee's motion for fees is denied.

AFFIRMED.

BOSLAUGH, J., concurs.

DIAN KELLY CARROLL, APPELLANT, V. GARY HOLTHUS, APPELLEE.
447 N.W.2d 22

Filed October 20, 1989. No. 87-1059.

Landlord and Tenant: Leases: Actions. In the absence of a statute to the contrary, a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, DONALD R. GRANT, Judge. Judgment of District Court affirmed.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellant.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from the district court for Lancaster County, which reversed the judgment of the Lancaster County Court and dismissed appellant's petition for forcible entry and detainer, which sought the return of possession of the leased garage located on appellant's property.

Appellant, Dian Kelly Carroll, assigns error by the district court in considering and ruling on the availability of forcible entry and detainer as a remedy and in holding that appellee had not breached the "maintenance and repair" provisions of the lease agreement.

This case involves the adjoining properties of 337-339 N. 32d Street and 349 N. 32d Street in Lincoln, Nebraska. Philip Meade originally owned both properties, and in 1980, he sold 337-339 N. 32d Street to appellee, Gary Holthus, pursuant to a land contract. The contract contained a provision that gave Holthus a 10-year lease of the garage at 349 N. 32d Street for the sum of $1. The lease provision also stated that Holthus had "the responsibility for maintenance and repair" of the garage.

Carroll purchased the property at 349 N. 32d Street from Meade in 1984, subject to Holthus' lease. Carroll eventually became dissatisfied with Holthus' "maintenance and repair" of the garage, and in July 1986, she gave Holthus a 30-day notice demanding performance of lease obligations. On September 5, 1986, Carroll gave Holthus a 3-day notice to vacate, with which Holthus did not comply. There is conflicting evidence as to whether Holthus properly maintained and repaired the garage.

Appellant argues that the district court erred in holding that a forcible entry and detainer action was not an appropriate remedy in this case. Appellant was bound by the contract between Meade and Holthus, as paragraph 15 of the contract states: "This Agreement shall bind the successors in interest of the parties." Appellant therefore complied with the notice provision in paragraph 11 regarding default:

> The failure to make any payment for a period of 45 days or the failure to perform any other provision of this Agreement for a period of 30 days after written demand for performance, shall be a default. Upon a default by Buyer, Seller may declare the unpaid balance immediately due and payable and institute foreclosure proceedings or any other remedy that may be available to Seller in law or equity.

Appellant asserts that the last sentence in paragraph 11 reserves to her the remedy of forcible entry and detainer. It does not. The words "may be available" in the above paragraph indicate only that permissible or allowable remedies are reserved.

> "[I]n the absence of a statute to the contrary a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach. . . ." *Olson v. Pedersen*, 194 Neb. 159, 165, 231 N.W.2d 310, 314 (1975).

Hogan v. Pelton, 210 Neb. 530, 536, 315 N.W.2d 644, 647-48 (1982).

The Meade-Holthus lease contains no express and distinct provision for forfeiture upon any breach of the lease except for the failure to pay rent. The district court was therefore correct in ruling that forcible entry and detainer was not an available remedy to appellant.

Appellant also argues that the district court improperly reviewed the record in determining that appellee did not breach the maintenance and repair provisions of the lease.

The district court, having properly found that the remedy of ejectment was not available to appellant, did not possess jurisdiction to further "inquire into the matters between the two litigants." Neb. Rev. Stat. § 24-568 (Reissue 1985). The matter of compelling repair or of damages sustained must be left to a different day and, dependent on the relief prayed for, a different forum.

The judgment of the district court is therefore affirmed.

AFFIRMED.

PEARL STUTHMAN, APPELLANT, V. ADELAIDE D. HULL TRUST ET AL., APPELLEES.

447 N.W.2d 23

Filed October 20, 1989. No. 88-004.

1. **Injunction: Equity.** An action for an injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Injunction: Proof.** A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.
4. **Waters.** Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation. Neb. Rev. Stat. § 31-201 (Reissue 1988).
5. **Waters: Negligence.** An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, which have no natural outlet or course of flow, by discharging the waters therefrom by means of an artificial channel into a natural surface water drain on his own property and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, provided that this is done in a reasonable and careful manner and without negligence.

Appeal from the District Court for Cuming County: RICHARD P. GARDEN, Judge. Affirmed.

Lynn D. Hutton, Jr., and Jan L. Remmich, of Hutton and Freese, for appellant.

John M. Thor for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from an order of the Cuming County District Court dismissing plaintiff's petition for equitable relief. We affirm.

On December 1, 1986, plaintiff filed a petition alleging that the defendants constructed a ditch which drained accumulated surface water from a depression or basin area located on defendants' land, across the defendants' land, and ultimately onto plaintiff's land. This drainage water caused the plaintiff's land to become soggy, preventing 11 acres of corn from being harvested by the tenant in 1986. The plaintiff sought a permanent injunction ordering defendants, in effect, to return defendants' land to its condition prior to the ditch's construction. The petition also requested $660 in money damages for rental loss for 1986.

The trial judge reviewed the evidence, which was received by stipulation, and made specific findings, including findings that the defendants brought themselves within the protection of Neb. Rev. Stat. § 31-201 (Reissue 1988) and that the plaintiff did not allege or prove negligence or lack of reasonable care on the part of the defendants. Consequently, he ordered that plaintiff's petition be dismissed at plaintiff's costs. From this order, the plaintiff appeals to this court.

On appeal, plaintiff alleges 11 assignments of error, all of which concern alleged erroneous factual findings. All assigned errors will be considered in our de novo review.

An action for an injunction sounds in equity. *Selection Research, Inc. v. Murman*, 230 Neb. 786, 433 N.W.2d 526 (1989). In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. In its de novo review of the record, this court is guided by the rule that a party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief. *Federal Land Bank of Omaha v. Swanson*, 231 Neb. 868, 438 N.W.2d 765 (1989).

We have reviewed the record de novo and make the following findings of material fact. The plaintiff, Pearl Stuthman, owns a parcel of farmland described as the west half of the

southwest quarter of Section 23, Township 23 North, Range 4 East of the 6th P.M., less approximately 4.6 acres owned by Melvin Brokaw, all in Cuming County, Nebraska. Since 1971, this land has been rented to Vernon Schultz, who has farmed the property.

The defendant Adelaide D. Hull Trust owns a parcel of farmland legally described as the southeast quarter of Section 22, Township 23 North, Range 4 East of the 6th P.M., in Cuming County, Nebraska. Since 1981, this land has been rented to Willis and Weslie Geu, who have farmed the property. Henry E. Hull, who is also a defendant, is the trustee.

The trust property lies immediately west of the Stuthman property, and the two properties are separated by a county road which runs to the north and south. A drainage culvert, which was installed by someone other than the defendants, lies under the surface of this road. The natural slope of the surrounding land deposits water into the road ditch on the west side of the road, and the water flows through the culvert from the west to the east onto the Stuthman land.

To the south and east of the Stuthman property lies the Anderson property. The Anderson and Stuthman properties are separated by a county road which runs to the east and west. A drainage culvert lies under the surface of this road and drains water from the north to the south and southeast into a creek which eventually flows into the Elkhorn River.

There is a natural basin or depression area located in the northwestern area of the trust property. Land surrounding the depression to the north, west, and south is higher in elevation than the depression. The east rim of the depression has a ridge about 2 feet higher than the lowest point of the depression. Surface waters accumulate in the depression during periods of above-normal moisture from either rainfall, irrigation runoff, or melting snows. Water which does not flow over the top of the eastern rim or ridge remains in the depression until it evaporates or percolates down through the soil. Water retention in the depression is only temporary, and the depression does not constitute a permanent lake or pond. This depression has periodically and temporarily accumulated surface water.

In July of 1986, Henry Hull, as trustee, directed that a

drainage ditch be dug to facilitate drainage by preventing the accumulation of surface water in the depression. The general direction of the flow of surface waters on the trust property is from the west to the east and southeast. The ditch was constructed through the ridge on the east side of the basin. The ditch terminates on the trust property, and the water flowing from this ditch empties into a natural drainage course or draw also located on the trust property. After the water leaves the trust property, it flows into the county road ditch, through the culvert, and across the Stuthman land, following the natural course of drainage in an east to southeast direction. After following this natural drainage course across the Stuthman property, the water flows through the drainage culvert under the east-west county road into a creek on the Anderson property, eventually draining into the Elkhorn River.

At the time the ditch was dug, the depression contained no water, and there was no sudden release of impounded waters. By constructing the ditch, the defendants have not diverted any water upon the lands of any others except into a natural draw or drainageway where the water would generally flow.

The wet areas on the Stuthman land would have been present even without the construction of the drainage ditch. Charles Mahnke, a soil scientist and soil specialist for the Soil Conservation Service for 29 years, testified for the defendants that there has been increased irrigation and precipitation runoff in the area since the early 1980s. The soil in the area of both properties is sandy. Sandy soil, because of its porous character, allows water to travel downward until it reaches "hardpan." When the water reaches the hardpan, it begins to migrate toward the general course of drainage, which is usually toward lower elevations, where it congregates or accumulates. Eventually, water will begin to appear on the surface of the land when the accumulations come to a point where the elevations have leveled out in the course of drainage. He testified that even without the construction of the ditch, both properties would have had wet areas in 1986 and 1987 and possibly into later years. This is because the wet areas on both properties are migrating to the east, following the natural course of drainage. Thus, even without the drainage ditch, wet areas or

accumulations of surface water would be migrating under the surface of the soil from the trust property onto the Stuthman property, which lies in the natural course of drainage. The Stuthman property is in no worse condition than it would be but for the construction of the ditch.

Moreover, it is likely the construction of the ditch will benefit the Stuthman property. Mahnke testified that the construction of the ditch will help reduce the wet areas that will exist on both the Stuthman and trust properties, because construction of the ditch allows runoff waters to travel at greater velocities across the surface of the ground, rather than allowing the water to percolate and then migrate under the surface of the ground. Although initially there may be some added water on the surface, in the long run the wet areas should dry faster because there will not be the slower percolation and migration of water through the porous soil to the lower elevations in the natural course of drainage. In sum, the construction of the ditch should actually benefit the Stuthman property because it allows runoff water to be removed from both properties in a shorter time period.

In light of the foregoing factual findings of this court, we hold that the trial judge properly dismissed the plaintiff's petition. Section 31-201 provides:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

This court has also stated:

> An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of

> drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence.

(Syllabus of the court.) *Aldritt v. Fleischauer*, 74 Neb. 66, 103 N.W. 1084 (1905). See, also, *Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950).

In *Todd v. York County*, 72 Neb. 207, 220-21, 100 N.W. 299, 305 (1904), we said:

> An owner has the undoubted right to protect his land from mere surface water and, in the interest of good husbandry, to drain lagoons or basins thereon of a temporary character, by discharging such surface waters by means of artificial channels into a natural surface water drain and through such drain or channel on and over the land of another, provided such person acts in a reasonable and careful manner and without negligence, and the injury, if any, resulting therefrom to such lower proprietor by reason of the increased flowage in the natural surface water drain will be accounted *damnum absque injuria*. For negligence in the manner of accomplishing the improvement, such owner is responsible and accountable to those injured by his negligent acts.

Applying these principles to the facts of this case, it is clear that the defendants fall within the protection of § 31-201 and this court's precedent. The depression or basin does not constitute a permanent lake or pond. It constitutes, at best, a temporary pond. The defendants rightfully constructed an open ditch which drained surface water from the depression into a natural draw or surface water drain located on the trust property. Through this draw, the water traveled onto and across the Stuthman land. Eventually, the drainage water, still following the natural course of drainage, would drain into a watercourse on the Anderson property. At no time after leaving the depression did the water travel on any land other than land in the natural and general course of drainage. Further, because the ditch was constructed entirely on the trust land, the trust is not liable for damages. The actions of the defendants are protected by § 31-201 and precedent from this court.

The protection afforded a defendant by § 31-201 is not absolute. A defendant can still be held responsible if plaintiff alleges and proves defendant acted negligently or without reasonable care. See, *Todd v. York County, supra*; *Aldritt v. Fleischauer, supra*; *Pospisil v. Jessen, supra*; *Halligan v. Elander*, 147 Neb. 709, 25 N.W.2d 13 (1946). Here, Stuthman made no attempt to show negligence or lack of reasonable care.

The order of the district court dismissing plaintiff's petition is affirmed.

AFFIRMED.

GRAPHIC RESOURCES, INC., APPELLEE, V. BRUCE E. THIEBAUTH, APPELLEE, AND RICHARD C. KEKEISEN, INTERVENOR-APPELLANT.

447 N.W.2d 28

Filed October 20, 1989. No. 88-179.

1. **Contracts.** The words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them.
2. _____. When a written contract is expressed in clear and unambiguous language, it is not subject to interpretation or construction.
3. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Mark J. Daly, of Nelson & Harding, for intervenor-appellant.

Frederick D. Stehlik, of Stehlik & Associates, for appellee Graphic Resources.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from an order of the district court for Douglas County granting Graphic Resources, Inc.'s, motion for summary judgment on Richard C. Kekeisen's petition to intervene in a replevin action.

This case began as an action in replevin brought by Graphic against Bruce E. Thiebauth to recover video equipment in Thiebauth's possession valued at $48,416. Kekeisen filed a petition to intervene, claiming a security interest in the equipment. On January 8, 1988, the court sustained Graphic's motion for summary judgment against the intervenor, Kekeisen, and dismissed the petition to intervene in the case. Kekeisen's motion for a new trial was denied, and he timely appealed, assigning seven errors, which may be summarized in Kekeisen's allegation that the trial court erred in finding that the word "additions" in Kekeisen's security agreement did not include after-acquired equipment as a matter of law. We affirm.

The record shows that on July 20, 1984, Kekeisen loaned $30,000 to Aircraft Video Marketing, Inc., and entered into a security agreement with Aircraft Video to cover items of equipment owned by Aircraft Video as of that date. Kekeisen later filed a financing statement perfecting his interest in the video equipment. The collateral was listed in the security agreement as follows: "All of Debtor's equipment, including replacement parts, additions, repairs, and accessories incorporated therein or affixed thereto. Without limitation the term 'equipment' includes all items used in recording, processing, playing back, or broadcasting moving or still pictures, by whatever process."

Additional video equipment was apparently purchased by Aircraft Video after the execution of the security agreement with Kekeisen. Kekeisen sums up the facts as follows: "In early 1985, Aircraft Video Marketing purchased the additional video equipment which is the subject of dispute in the instant action, for use with the existing video equipment in its business." Brief for appellant at 6. Graphic's petition in replevin listed specific equipment, and there is no argument but that the property listed in the petition was purchased by Aircraft Video after the execution of Kekeisen's security agreement.

On May 17, 1985, Graphic entered into a purchase agreement with Aircraft Video to purchase all of the assets of Aircraft Video with funds procured through a loan from First National Bank of Omaha. As security for the loan, First National took a security interest in all of Aircraft Video's assets, including all property "now owned or hereafter acquired" by Aircraft Video.

Use of after-acquired property clauses in security agreements are expressly allowed by Neb. U.C.C. § 9-204 (Reissue 1980). The only limitation on their use with which we are presently concerned relates to the sufficiency of the description of collateral. Neb. U.C.C. § 9-110 (Reissue 1980) provides, "For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

The term "additions," as it is used in the security agreement, does not sufficiently describe in legal or lay terms the equipment acquired by Aircraft Video after the execution of the security agreement. "Addition" is defined in Black's Law Dictionary 35 (5th ed. 1979) as an "[e]xtension; increase; augmentation." This definition in no way contemplates that "additions" is sufficient to reasonably identify the after-acquired collateral.

Furthermore, considering the context in which "additions" is used in Kekeisen's security agreement, no reasonable interpretation could lead us to conclude that after-acquired property was intended as its meaning. "The words used in the contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them." *Bedrosky v. Hiner*, 230 Neb. 200, 206, 430 N.W.2d 535, 540 (1988). "Additions" is not set out distinctly, but is listed among the words "replacement parts . . . repairs, and accessories," and, in its ordinary sense, clearly and unambiguously refers to items like replacement parts, repairs, and accessories, which can be incorporated in or affixed to the existing equipment. A written contract is not subject to interpretation or construction if it is expressed in clear and unambiguous language. *Young v. Tate*, 232 Neb. 915, 442 N.W.2d 865 (1989).

Had the parties chosen to do so, they could have easily included language clearly stating that after-acquired equipment would be included in the security agreement. While a description need not refer to the items of collateral with specificity, the description must, at a minimum, reasonably identify the after-acquired collateral. § 9-110. The security agreement presently before us contains no such language.

> It [summary judgment] is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

International Harvester Credit Corp. v. Lech, 231 Neb. 798, 801, 438 N.W.2d 474, 477 (1989). Kekeisen's assignment of error is without merit because there was no genuine issue as to any material fact, and Graphic was entitled to judgment as a matter of law. The decision of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. BROADSTONE, APPELLANT.

447 N.W.2d 30

Filed October 20, 1989. No. 88-915.

1. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts in the evidence, pass on the witnesses' credibility, determine the plausibility of explanations, or reweigh the evidence. These matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Disturbing the Peace: Words and Phrases.** A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it

signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community.

3. _____: _____. The term "breach of the peace" is generic and includes all violations of public peace, order, or decorum, or acts tending to the disturbance thereof.
4. **Constitutional Law: Disturbing the Peace: Words and Phrases.** Language that tends to incite assault or other immediate breach of the peace constitutes "fighting" words, which are not constitutionally protected forms of speech.
5. _____: _____: _____. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.
6. **Constitutional Law.** Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.
7. **Disturbing the Peace: Words and Phrases.** The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.
8. **Disturbing the Peace.** Provocative language consisting of profane, indecent, or abusive remarks directed to the person of the hearer may amount to a breach of the peace.
9. **Appeal and Error.** The Supreme Court does not consider assignments of error not discussed in the brief.
10. **Appeal Bonds.** Generally, an objection to an appeal bond cannot be made by appeal.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

After trial to a jury the defendant, David L. Broadstone, was convicted of disturbing the peace and was sentenced to probation for 18 months. Upon appeal to the district court, the judgment was affirmed. The defendant has now appealed to this court.

The defendant's assignments of error allege that the evidence was not sufficient to support the verdict and that the trial court erred in allowing the complaining witness to testify about the defendant's disturbing the peace and quiet of someone other than the person alleged in the complaint, in overruling the defendant's motion in limine, and in prohibiting the defendant from being around children under 14 years of age or going within a block of places normally frequented by children.

Neb. Rev. Stat. § 28-1322(1) (Reissue 1985) describes the offense of disturbing the peace as intentionally disturbing the peace and quiet of any person, family, or neighborhood. The complaint in this case alleged that the defendant had intentionally disturbed the peace and quiet of a person, family, or neighborhood, "to-wit: Jerry L. Gulizia . . . ."

The record shows that on March 31, 1988, Jerry Gulizia and Randall Keefe were waiting in Gulizia's front yard for their children to get out of Merle Beattie elementary school in Lincoln, Nebraska. Gulizia's daughter attended school at Merle Beattie, which was located just across the street from his house. While Gulizia and Keefe were waiting for their children, their attention was drawn to the defendant and a child, who were across the street. The defendant was using foul language and had a stick in his hand which he was hitting against a telephone pole. Children were coming out of the school at the time, and Gulizia saw 15 or 20 children walk by during that time. Gulizia testified that the defendant was using foul language when the children were near him.

Gulizia testified he heard the defendant say words like "motherfucker," and the child with the defendant would then repeat what the defendant had said. When the language continued, and their children started to cross the street, Gulizia and Keefe decided to cross the street and talk to the defendant because some of the children appeared to be frightened. Gulizia

said that he was not shocked by what he heard, but he was upset that the children were exposed to it.

After Gulizia and Keefe had crossed the street, Gulizia asked the defendant if he was waiting for some children. The defendant replied it was none of his "fucking business." Gulizia then asked the defendant if he would leave. The defendant became violent and began shaking the stick, striking Gulizia on the arm and yelling obscenities such as "cocksucker" and "motherfucker." Gulizia then pushed the defendant against the fence and tried to settle him down.

After Gulizia released the defendant, the defendant ran down the sidewalk and said, "Your wife is a whore. Your daughter is a whore. Your whole family's a whore. I fucked her last night." At that time there were 15 or 20 children scattering to get away from the defendant.

When asked how the defendant's comments made him feel, Gulizia stated, "It didn't make me feel too good," and he was upset by the defendant's behavior.

Gulizia further testified that he was upset by the defendant's swearing in front of the children. He was not bothered by the defendant's swearing at him, but it was the fact the defendant was swearing in front of the children that bothered him. Gulizia asked his wife to call the police.

Keefe's testimony generally corroborated the testimony of Gulizia.

Officer Michael Martin, who responded to the call, testified that in response to his questions, the defendant said that he was standing on the sidewalk in front of the school with his nephew, who was slightly retarded, and that the nephew had been yelling obscenities at the children. The defendant said he was trying to get the nephew to be quiet when two men came over and pushed him against the fence.

The defendant testified that while he and his nephew were taking a walk, his nephew started mumbling something when the children started coming out of school. The defendant was not swearing at the children, but the nephew was because one of the children had kicked him. The defendant then told his nephew to "quit saying those fucking words," which was when Gulizia and Keefe came across the street. According to the

defendant, Gulizia pushed him against the fence and threatened to kill him. When Gulizia released the defendant, the defendant said, Gulizia made an obscene remark to the defendant. The defendant responded by saying, "Well, I screwed your wife last night, and I thought she was a whore." The defendant admitted using profanity toward Gulizia, but not toward the children.

The jury returned a verdict of guilty, and the defendant was sentenced to probation for 18 months. Upon appeal to the district court, the judgment was affirmed.

In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in the evidence, pass on the witnesses' credibility, determine the plausibility of explanations, or reweigh the evidence. These matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Culver, ante* p. 228, 444 N.W.2d 662 (1989).

The evidence of the State which has been summarized was sufficient, if believed, to permit the jury to find the defendant guilty beyond a reasonable doubt.

In *State v. Coomes*, 170 Neb. 298, 301-02, 102 N.W.2d 454, 457 (1960), we said:

> A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. [Citations omitted.]
>
> Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof.

In *State v. Sukovaty*, 178 Neb. 779, 135 N.W.2d 467 (1965), the defendant was charged with disturbing the peace by publicly cursing, swearing, and using profane, obscene, indecent, abusive, and offensive language against the complaining witness. The evidence showed that the defendant failed to leave after being requested to do so and used profane and abusive language against the complaining witness and disturbed his

peace and quiet by disorderly conduct. In affirming the conviction, we approved a definition of disorderly conduct as any act which tends to breach the peace or disturb those who see or hear it, and a definition of peace, as used in this phrase, as the tranquility enjoyed by members of a community where good order reigns.

The defendant argues that his language was protected speech under his right to freedom of speech under the 1st and 14th amendments to the U.S. Constitution. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), defines language that tends to incite assault or other immediate breach of the peace as "fighting" words, which are not constitutionally protected forms of speech. In the *Chaplinsky* case the Court said at 571-72:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309-310.

In *Cantwell v. Connecticut*, 310 U.S. 296, 308-10, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), the Court said:

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. . . .
>
> . . . .
>
> . . . One may, however, be guilty of the offense if he

> commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

This court has held words such as those used by the defendant are fighting words. See *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985).

The defendant's motion in limine sought to prevent the State from arguing the evidence because the evidence related to the defendant's disturbing the peace and quiet of someone other than the person named in the complaint. The evidence established that, in addition to the defendant's statements directed at Gulizia personally, the defendant's use of profanity in the presence of the children disturbed Gulizia.

In *The State v. Burns*, 35 Kan. 387, 11 P. 161 (1886), the defendant's conviction for disturbing the peace was affirmed, although the objectionable words and acts of the defendant were directed toward her former husband and not the complaining witness. The Kansas Supreme Court approved an instruction which stated in part:

> "Although the words and acts of the defendant may have been primarily directed against some person other than [the complaining witness] or his family, yet if the defendant's words and acts were wrongful and willful, and the natural and necessary consequences of them were the disturbance of [the complaining witness] and his family, the defendant is equally guilty as though she had no other intention than the disturbance of [the complaining witness] and his family. . . ."

Id. at 390, 11 P. at 162. The assignment of error is without merit.

The trial court included the following conditions in the order of probation:

> 10. Shall have no contact with children 14 years of age or younger, except in the presence of any such child's parent or guardian. This term includes Mr. Broadstone's immediate family. For purposes of this term, "no contact" means that Mr. Broadstone shall not affirmatively remain in the physical presence of children. Further, he shall not telephone, write or converse directly or indirectly with children.
>
> 11. To physically stay away from every public or private schoolground, public or private playground, recreational center, athletic field, swimming pool and any other place, public or private, where children habitually congregate. For the purposes of this term "stay away" means that Mr. Broadstone shall not be found within one city block of any of the above places.

Although the defendant assigned error as to these conditions, the matter was not argued in the defendant's brief. This court does not consider assignments of error not discussed in the brief. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987).

Similar conditions were included in the defendant's bonds. Generally, an objection to a bond cannot be made by appeal. See, *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974); *State v. Watkins*, 190 Neb. 450, 209 N.W.2d 184 (1973).

The judgment is affirmed.

AFFIRMED.

RICHARD G. McMICHAEL, APPELLEE, V. LANCASTER COUNTY SCHOOL DISTRICT 001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, APPELLANT.

447 N.W.2d 35

Filed October 20, 1989. No. 88-1019.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Expert Witnesses.** Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.
4. **Workers' Compensation: Proof.** A workers' compensation award cannot be based on mere possibility or speculation, and if an inference favorable to the plaintiff can only be reached on the basis thereof, then he cannot recover.

Appeal from the Nebraska Workers' Compensation Court. Reversed.

John M. Guthery and Maureen A. Lauren, of Perry, Guthery, Haase & Gessford, P.C., for appellant.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from an order of the Nebraska Workers' Compensation Court awarding the plaintiff employee, Richard G. McMichael, compensation for an injury he sustained while he was employed as an assistant building superintendent for Lancaster County School District 001.

Plaintiff states in his petition that he sustained an injury to his back while moving a file cabinet at a Lincoln public school on September 23, 1987. The school district does not contest the fact that the plaintiff suffered an injury which arose within the scope of his employment or that plaintiff gave timely notice of

the injury.

The medical evidence was submitted on various hospital patient summaries, doctors' notes, and doctors' reports. Plaintiff sought medical treatment for pain in his leg and back on October 22, 1987. Plaintiff's physician diagnosed the injury as a herniated lumbar disk and referred plaintiff to a neurological surgeon, Dr. Benjamin Gelber. On November 13, 1987, Dr. Gelber performed a "[p]artial hemilaminectomy, fourth lumbar, left, with removal of protruded intervertebral disk, foraminotomy, 11-13-87." On December 28, 1987, Dr. Gelber prepared a written statement containing the following: "He [plaintiff] has made an excellent recovery. He can return to his previous employment without medical restriction as of 1-2-88." In a letter dated January 7, 1988, Dr. Gelber stated: "The protruded disc was most likely caused by the accident at work . . . . A protruded disc requiring laminectomy at a single level without neurologic deficit, in my opinion, should produce a permanent partial impairment of the whole man of 15%."

On August 9, 1988, a judge of the Workers' Compensation Court awarded plaintiff temporary disability benefits and ordered the school district to reimburse plaintiff for the medical expenses he incurred resulting from the injury. The court denied compensation for a permanent partial disability because plaintiff failed to prove a loss or reduction in his earning power.

The case was submitted for rehearing before a three-judge panel on the stipulated set of facts contained in a September 9, 1988, pretrial order. The stipulated facts show that sometime after plaintiff returned to work, he was promoted to building superintendent and received an increase in pay and that plaintiff is able to perform all the job-related duties he was performing before the injury and all of the duties currently required of him as building superintendent. However, it was also stipulated that plaintiff, on occasion, suffers pain and discomfort in the area of the injury. The stipulation also contained the medical report, as quoted above, as to "permanent partial impairment."

Based upon these facts, the panel found that plaintiff sustained a loss of earning power insofar as his ability to procure employment generally had been impaired, and

concluded that plaintiff suffered a permanent disability of 15 percent to the body as a whole. The panel modified the one-judge order and awarded plaintiff additional compensation for a permanent partial disability and awarded plaintiff attorney fees.

The school district timely appeals, assigning two errors. The school district contends (1) that there was insufficient evidence to support the Workers' Compensation Court's award of permanent partial disability and (2) that the Workers' Compensation Court erred in awarding plaintiff attorney fees. We reverse.

With regard to the first assignment of error, the school district does not contest the fact that plaintiff suffered a work-related injury and does not contest the payment of the medical expenses and temporary disability for the injury. The issue here only relates to whether the Workers' Compensation Court correctly found that plaintiff has proved his injury resulted in a compensable permanent partial disability.

Whether plaintiff suffers from such a disability is a factual question. The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Alley v. Titterington, ante* p. 71, 443 N.W.2d 615 (1989).

The school district contends that there is insufficient evidence to sustain the panel's finding that plaintiff suffered a permanent partial disability, because plaintiff failed to adduce sufficient medical evidence showing that the injury resulted in such a disability. In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Roesler v. Farmland Foods*, 232 Neb. 842, 442 N.W.2d 398 (1989).

In considering the evidence required, we stated in *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 621, 423 N.W.2d 483, 486 (1988):

> "Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an

> expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury."

Plaintiff urges that the panel's order is supported by Dr. Gelber's expert opinion as reflected in his January 7, 1988, letter showing the nature and extent of the disability. Dr. Gelber's letter stated: "A protruded disc requiring laminectomy at a single level without neurologic deficit, in my opinion, should produce a permanent partial impairment of the whole man of 15%." The school district contends that the use of the word "should" in the statement is merely speculative and does not support the finding that plaintiff's injury did result in a disability.

We need not decide whether the opinion of the doctor, as phrased, constitutes a sufficient opinion to support a finding that plaintiff did, in fact, suffer a 15-percent permanent partial disability. The opinion is a sort of syllogism. The doctor states that plaintiff suffered from a protruded disk and was operated on and that such a condition, after operation, should result in 15 percent disability. What is lacking, of course, is the conclusion that this plaintiff, therefore, has suffered a 15-percent disability. However, for the purposes of this opinion only, we shall treat the doctor's opinion as sufficient to support a 15-percent disability finding, if the opinion is otherwise sufficient.

It is our conclusion that the opinion cannot be sufficient to support the 15-percent finding in this case. In the doctor's surgical notes and in the hospital summaries the operation performed by Dr. Gelber on plaintiff is described as a "partial hemilaminectomy." The letter opinion states that a "laminectomy at a single level" should result in a 15-percent permanent partial impairment. Whether a "partial hemilaminectomy" is identical with a "laminectomy," and whether the two operations result in the same disability, is certainly beyond the ken of a nonmedical fact finder, without further evidence.

In 2 J. Schmidt, Attorney's Dictionary of Medicine and Word Finder H-48 and H-49 (1987), hemilaminectomy is defined as follows:

> The word "laminectomy," without the prefix hemi-, denotes a surgical operation for the removal of the laminae (singular, *lamina*) of one or more vertebrae. . . . The prefix hemi- means *half*, and the word *hemilaminectomy* means the removal of one or more laminae on *one side* of the vertebral column . . . .

(Emphasis in original.) See, also, to the same effect, R. Sloane, The Sloane-Dorland Annotated Medical-Legal Dictionary (1987).

Whether the additional word "partial" in the surgeon's notes is redundant or signifies a lesser removal is not known. Without explanation, the terms "laminectomy" and "partial hemilaminectomy" cannot be considered synonymous.

Dr. Gelber's letter is not sufficiently definite to provide the basis of an award for permanent disability to the plaintiff in this case. A workers' compensation award cannot be based on mere possibility or speculation, and if an inference favorable to the plaintiff can only be reached on the basis thereof, then he cannot recover. *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982).

When the evidence in the record is insufficient to warrant the making of the award, or the factual findings made by the Workers' Compensation Court do not support the award, the Supreme Court must modify, reverse, or set aside that award. Neb. Rev. Stat. § 48-185 (Reissue 1988); *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1988). The Workers' Compensation Court erred as contended in the school district's first assignment of error.

The school district contends in its second assignment of error that the panel erred in awarding plaintiff attorney fees. In view of the result reached herein, the district is correct in that contention also. The judgment is reversed and the cause remanded to enter judgment in accordance with this opinion.

REVERSED.

WHITE, J., concurs.

SCOULAR GRAIN COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. PIONEER VALLEY SAVINGS BANK, AN IOWA CORPORATION, APPELLANT, AND JAMES L. WAGNER, SHERIFF, APPELLEE.

447 N.W.2d 38

Filed October 20, 1989. No. 89-100.

1. **Judgments: Liens: Real Estate: Vendor and Vendee.** A judgment recovered against one who has agreed to sell land but has made no deed nor received the whole of the purchase money constitutes a lien on the seller's interest in the land.
2. **Judgments: Liens: Real Estate.** A judgment lien on real estate in the name of the judgment debtor is a lien only on the actual interest of the judgment debtor and is subject to all existing equities whether of record or not.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Mohummed Sadden for appellant.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, for appellee Scoular Grain Company.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Defendant-appellant, Pioneer Valley Savings Bank, challenges the district court's issuance of an injunction as sought by the plaintiff-appellee, Scoular Grain Company, in this declaratory judgment action. The injunction prevents Pioneer from proceeding with an execution sale of certain real estate in which both Pioneer and Scoular claim interests. Pioneer's operative assignments of error merge to claim that the district court's judgment is legally erroneous. We affirm.

The record reveals the relevant stipulated facts to be that on August 31, 1987, Eugene M. O'Neill and Scoular entered into a written agreement under the terms of which O'Neill undertook to sell and Scoular undertook to purchase certain real and personal property located in South Sioux City, Dakota County, Nebraska, for a total of $900,000. The agreement recites that the sale was for the purpose of enabling O'Neill to "make appropriate provisions for satisfaction or treatment of all valid

interests of the Internal Revenue Service . . . ."

The agreement was never recorded, but on January 8, 1988, a memorandum calling attention to its existence and identifying the properties involved was filed with the Dakota County register of deeds.

The record further reveals that Scoular had occupied at least part of the real estate and possessed at least some of the personal property under the terms of certain leases it had made with O'Neill in 1979 and 1984, the first of which was recorded with the Dakota County register of deeds, but the second of which was not recorded. In mid-1984, O'Neill assigned the percentage rents due him under said leases to Pioneer, as security for his then indebtedness to Pioneer. This document was recorded with the Dakota County register of deeds. On September 3, 1987, O'Neill's attorney wrote a letter informing Pioneer that O'Neill was in the process of selling his properties and requesting documentation as to Pioneer's interests.

On September 29, 1987, Pioneer recovered a judgment against O'Neill in the district court for Dakota County in the sum of $21,740.28 and interest. On an undisclosed date, Pioneer issued a writ of execution upon the subject real estate, under which an execution sale was scheduled to be held on February 3, 1988.

On January 21, 1988, an escrow agreement was executed between Scoular, as buyer, O'Neill, as seller, and Security Land Title Company, as escrow agent, whereby the transaction was closed, and Scoular made payment of the entire purchase price, which was deposited with the escrow agent to be disbursed to satisfy various mortgage liens, federal tax liens, real estate taxes, and special assessments against the property. The warranty deed conveying title to the property from O'Neill to Scoular was recorded on January 25, 1988, in the office of the register of deeds of Dakota County.

This court last addressed the issue presented by this appeal but a decade ago in *Monroe v. Lincoln City Employees Credit Union*, 203 Neb. 702, 279 N.W.2d 866 (1979). There, applying law announced earlier in *Doe v. Startzer*, 62 Neb. 718, 87 N.W. 535 (1901), and *Courtnay v. Parker*, 16 Neb. 311, 20 N.W. 120 (1884), *on appeal after remand* 21 Neb. 582, 33 N.W. 262

(1887), we restated the rule that a judgment recovered against one who has agreed to sell land but has made no deed nor received the whole of the purchase money constitutes a lien on the seller's interest in the land. And as noted in *Halsted v. Halsted*, 169 Neb. 325, 327-28, 99 N.W.2d 384, 386 (1959), "[A] judgment lien on real estate in the name of the judgment debtor is a lien only on the actual interest of the judgment debtor and is subject to all existing equities whether of record or not." See, also, *Knaak v. Brown*, 115 Neb. 260, 212 N.W. 431 (1927).

Applying the principles from *Monroe* and *Halsted*, it is clear that Pioneer's judgment lien was subject to the earlier unrecorded contract for the sale of real estate between O'Neill and Scoular. Pioneer's interest in the subject property consisted of a lien on O'Neill's interest as the seller of real estate. While prior liens against the property prevented either O'Neill or Pioneer from receiving any of the proceeds from the sale to Scoular, O'Neill's interest as the seller was conveyed by the sale to Scoular. Similarly, Pioneer's interest in the property, being derived from O'Neill's, was also conveyed by such sale. Thus, we must and do hereby affirm the judgment of the district court.

AFFIRMED.

IN RE INTEREST OF A.M.H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. A.M.H., APPELLANT.

447 N.W.2d 40

Filed October 20, 1989. No. 89-127.

1. **Constitutional Law: Appeal and Error.** Generally, a constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
2. **Constitutional Law: Equal Protection.** Equal protection guarantees that similar persons will be dealt with similarly by the government.
3. _____: _____. When examining a claim of deprivation of equal protection, the first inquiry is whether the statute discriminates among those who are similarly situated.

4. **Juvenile Courts: Minors.** The theory of the law is that a commitment of a juvenile to a youth training center is not punishment but is the furnishing of protection, care, and training by the State as a substitution for parental authority.
5. **Constitutional Law: Equal Protection: Juvenile Courts: Minors.** Since juvenile offenders and adult offenders are not similarly situated, there is no deprivation of equal protection when a juvenile adjudged to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(1), (2), or (4) (Reissue 1988) is, pursuant to Neb. Rev. Stat. § 43-286 (Reissue 1988), confined for a longer period than an adult convicted of the same offense could be incarcerated.
6. **Appeal and Error.** This court normally will not consider assignments of error which are not discussed in the brief.
7. _____. This court does always reserve the right to note plain error.
8. **Appeal and Error: Words and Phrases.** Plain error is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
9. **Juvenile Courts: Records.** In the absence of a valid waiver by all parties to the proceedings in a juvenile court, a verbatim transcript of those proceedings shall be made and preserved.
10. **Juvenile Courts: Appeal and Error.** An adjudication under the Juvenile Code is an appealable order.
11. _____: _____. In an appeal from a separate juvenile court, the Supreme Court reviews the findings of that court de novo on the record.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Reversed and remanded with directions.

Robert C. Wester, Assistant Sarpy County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Royce N. Harper for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

This is an appeal by a juvenile from the order of the separate juvenile court of Sarpy County which committed her to the custody of the Nebraska Department of Correctional Services in the care and custody of the Youth Development Center-Geneva. The juvenile appellant assigns as error that her

commitment to the Youth Development Center-Geneva is contrary to law and that the juvenile commitment statute, Neb. Rev. Stat. § 43-286 (Reissue 1988), is unconstitutional, and her commitment therefore is invalid.

The appellant was born on June 6, 1971. The original charges filed against her were: count I, that on September 6, 1987, she operated a motor vehicle without having first obtained a valid, current operator's license and, count II, that she exerted unauthorized control over a propelled motor vehicle of another without the owner's consent. It was also charged that she deported herself so as to injure or endanger seriously the morals or health of herself or others, as described in Neb. Rev. Stat. § 43-247(3)(b) (Reissue 1988).

At her rearraignment held on March 1, 1988, which was attended by the juvenile, her attorney, and her mother, the appellant, pursuant to a plea bargain whereby count II was dismissed, admitted the allegations as to count I. Accordingly, the court found and adjudged the appellant a child within § 43-247(1) and (3)(b) on proof beyond a reasonable doubt. An inquiry as to disposition was held immediately and was done off the record at the request of the appellant's counsel. Disposition was apparently based upon the appellant's confidential social file, which was made a part of the record. It consisted of various dispositional worksheets, reviews, and evaluations. The court ordered the appellant committed "to the care and custody of the Department of Correctional Services, State of Nebraska, by delivery to the Youth Development Center, Geneva, Nebraska," but then ordered the commitment suspended under certain terms and conditions. This appears only in the findings and order contained in the transcript. No other record was made of those proceedings.

Further hearings were had on June 1 and December 2, 1988, and January 12 and February 9, 1989. At the January 12 hearing, the court ordered the previous suspension of commitment vacated and ordered the appellant committed to the care and custody of the Department of Correctional Services by delivery to the Youth Development Center-Geneva. No reason for this action was given in the order of the court found in the transcript on appeal, and no reported record of

those proceedings appears in the bill of exceptions. As a matter of fact, in response to a request by the State for a record of that hearing, as well as hearings held on June 1 and December 2, 1988, the court reporter responded that she had made no record of those proceedings. A motion to vacate that commitment was overruled on February 9, 1989. The juvenile has appealed.

We will deal first with the appellant's second assignment of error, which is based on the contention that § 43-286 denies equal protection to those juveniles who have been adjudicated as juveniles within the meaning of § 43-247(1), (2), or (4), because such juveniles could potentially be confined for a longer period of time than an adult could be incarcerated if convicted of the same offense. In this particular case, appellant could be confined to the Youth Development Center-Geneva until she reaches the age of 19, a possible period of a year and a half, whereas the longest period for which an adult convicted of operating a motor vehicle without an operator's license could be incarcerated is 3 months. See, Neb. Rev. Stat. § 60-430 (Reissue 1988) and § 28-106(1) (Cum. Supp. 1988).

Appellant raises the equal protection issue for the first time in this appeal. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988).

Notwithstanding appellant's failure to properly raise the constitutional issue, her assignment of error is without merit.

Equal protection guarantees that similar persons will be dealt with similarly by the government. *In re Interest of S.L.P.*, 230 Neb. 635, 432 N.W.2d 826 (1988); *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). When examining a claim of deprivation of equal protection, the first inquiry is whether the statute discriminates among those who are similarly situated. *In re Interest of S.L.P., supra*; *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986). Section 43-286 does not deny equal protection to juveniles adjudged to be juveniles within the meaning of § 43-247(1), (2), or (4), because such juvenile offenders are not similarly situated to adult offenders inasmuch as an institutional placement of a minor is not to be

equated with the incarceration of an adult offender.

As expressed by the court in *Smith v. State*, 444 S.W.2d 941, 944-45 (Tex. Civ. App. 1969):

> The purpose of our statutes relating to the handling of youthful offenders is, as in other states having juvenile court systems, the education, treatment and rehabilitation of the child, rather than retributive punishment. The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature. Instead of a complaint or indictment we have a "petition." The hearing never results in a conviction, but may lead to an "adjudication of delinquency." Where confinement of the delinquent child is indicated as the proper treatment, the child is not sentenced to prison but, instead, is "committed" to a "training school." The adjudication of delinquency does not carry with it any of the civil disabilities ordinarily resulting from conviction of crime, nor is the child considered to be a criminal because of such adjudication.

The issue before the court in the case of *In re T. D.*, 81 Ill. App. 3d 369, 401 N.E.2d 275 (1980), was whether a juvenile misdemeanant is denied due process and equal protection of the laws by commitment to the Department of Corrections for an indeterminate term. Although the minor failed to raise the constitutional issue in the trial court, the court nevertheless addressed the merits of the issue and found that the minor was not deprived of due process or equal protection by virtue of the dispositional order imposed. The court explained:

> We do not find adult offenders and juveniles adjudicated delinquent to be "similarly circumstanced" and, indeed, it is not the purpose of the Illinois Criminal Code and Juvenile Court Act to treat them as similarly circumstanced. The Juvenile Court Act has a legitimate and salutary goal, "to provide for the rehabilitation of delinquent minors at a stage before they have embarked upon the commission of substantive criminal offenses." . . . The primary purpose of the Act is remedial and preventive rather than punitive. . . .

> To this end the juvenile court acts as *parens patriae* . . . and the court and its allied agencies must be enabled to give the minor the care and guidance the Act is designed to provide . . . . As the indeterminate sentencing scheme of the Act is considered to play a useful role in achieving this goal and is applied similarly to all juveniles declared to be delinquent, it meets constitutional standards.
>
> . . . We note further that the Act offers unique benefits and favorable treatment to juvenile offenders which are not available to adult offenders. A juvenile may at any time apply to the court for a change in custodianship from the Department of Corrections or for restoration to the custody of his parents . . . and the court must terminate its wardship of a minor and all proceedings under the Act if at any time it finds the best interests of the minor and the public no longer require it to be continued . . . . In addition to this continuous opportunity to seek early release, the juvenile incurs no criminal record and is not disqualified from subsequently holding public office or receiving any license other than, in an appropriate case, one relating to the operation of motor vehicles. . . . There is also special provision for the confinement of minors, who, if under 17 years of age, may not be incarcerated with adult criminal offenders. . . .

(Citations omitted.) 81 Ill. App. 3d at 372-73, 401 N.E.2d at 277.

Although this court has not previously addressed the equal protection issue raised by appellant, this court's decision in *State v. Pinkerton*, 186 Neb. 225, 182 N.W.2d 198 (1970), suggests that in Nebraska, juvenile offenders are not considered to be similarly situated to adult offenders. In *Pinkerton*, a 15-year-old boy was convicted of petit larceny and committed to the custody of the Department of Public Institutions, in the care and custody of the Boys' Training School. He argued that his sentence was excessive because he might be held at the Boys' Training School for years, whereas an adult could not be imprisoned in the county jail for more than 6 months for the same offense.

At issue was the right of the trial court to commit the juvenile

to the custody of the Department of Public Institutions instead of imposing the penalty prescribed by Neb. Rev. Stat. § 28-512 (Reissue 1964) (imprisonment in county jail for not more than 6 months, a fine of not more than $500, or both). This court stated:

> The procedure which was followed in this case is not specifically authorized by any statute of this state. However, it is unnecessary to determine in this case whether the commitment was valid under the Juvenile Court Act because commitment of the defendant to the Boys' Training School is specifically authorized under section 83-465, R.S. Supp., 1969.
>
> It has been the policy of this state, at least since 1879, to authorize special treatment for juvenile offenders. Although prosecuting officers have a discretion as to whether to proceed against juvenile offenders directly under the criminal statutes or under the Juvenile Court Act, the Legislature has provided that in either case a child under the age of 18 may be committed to the Boys' Training School. . . . Section 83-465, R.S. Supp., 1969, provides that when a boy of sane mind under the age of 18 years, has been found guilty of any crime, except murder or manslaughter, in any court of record, the court may order that the boy be committed to the Boys' Training School. It was within the discretion of the district court to commit the defendant in this case to the Boys' Training School.
>
> A commitment to the Boys' Training School is not for a definite period. § 83-472, R.S. Supp., 1969 . . . . The theory of the law is that commitment to the Boys' Training School is not punishment but is the furnishing of protection, care, and training by the State as a substitution for parental authority. The object is reformation, not incarceration for a fixed period.

(Citations omitted.) 186 Neb. at 227, 182 N.W.2d at 199.

As authority for her equal protection argument, appellant relies on *People v. Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976). *Olivas* is distinguishable from the case before this court. Olivas was prosecuted as an adult, adjudged by the

same standards that apply to any competent adult, and convicted as an adult in an adult court. *Id.* In the present case, appellant was brought before the juvenile court, adjudged under provisions of the Nebraska Juvenile Code, and committed by the juvenile court to a juvenile facility.

In *Olivas*, the California Supreme Court acknowledged:

> We are not confronted by a situation in which a juvenile adjudged *under the Juvenile Court Law as a juvenile* contends that his term of involuntary confinement may exceed that which might have been imposed on an adult or juvenile who committed the identical unlawful act and was thereafter convicted *in the criminal courts*. Since that situation is not before us, we reserve consideration of the issue should it arise in some future case and we express no opinion on the merits of such a contention.

(Emphasis in original.) *Id.* at 243 n.11, 551 P.2d at 379 n.11, 131 Cal. Rptr. at 59 n.11.

In the case of *In re Eric J.*, 25 Cal. 3d 522, 601 P.2d 549, 159 Cal. Rptr. 317 (1980), the California Supreme Court had before it the type of juvenile case not before it in *Olivas*. The court held that a juvenile is not denied equal protection by the California Welfare and Institutions Code section under which a juvenile may be confined longer than an adult may be incarcerated for the same offense, because minors adjudged wards of the juvenile courts and committed to the Youth Authority are not similarly situated to adults convicted in the criminal courts.

Other courts have addressed the issue of whether equal protection is violated by confinement of a juvenile for a period longer than an adult would be incarcerated for the same offense and have found no violation. See, *People In Interest of M.C.*, 774 P.2d 857 (Colo. 1989); *United States v. Lowery*, 726 F.2d 474 (9th Cir. 1983), *cert. denied* 469 U.S. 837, 105 S. Ct. 133, 83 L. Ed. 2d 73 (1984) (Federal Youth Corrections Act); *State v. Rice*, 98 Wash. 2d 384, 655 P.2d 1145 (1982); *Appeal, In Maricopa Cty. Juvenile No. J-86509*, 124 Ariz. 377, 604 P.2d 641 (1979), *vacating* 124 Ariz. 380, 604 P.2d 644, *cert. denied* 445 U.S. 967, 100 S. Ct. 1660, 64 L. Ed. 2d 245 (1980); *In re Interest of J. K.*, 68 Wis. 2d 426, 228 N.W.2d 713 (1975); *People ex rel. Cromwell v. Warden*, 74 Misc. 2d 642, 345 N.Y.S.2d 381

(1973); *State in Interest of K. V. N.*, 116 N.J. Super. 580, 283 A.2d 337 (1971), *aff'd* 60 N.J. 517, 291 A.2d 577 (1972); *Wilson Appeal*, 438 Pa. 425, 264 A.2d 614 (1970) (juvenile may be confined for a period longer than an adult would be incarcerated for the same offense provided longer commitment will result in the juvenile's receiving appropriate rehabilitative care and not just deprivation of his or her liberty for a longer period); *State v. Pitt*, 28 Conn. Supp. 137, 253 A.2d 671 (1969); *Brisco v. United States*, 368 F.2d 214 (3d Cir. 1966) (Federal Youth Corrections Act).

Since juvenile offenders and adult offenders are not similarly situated, there is no deprivation of equal protection when a juvenile adjudged to be a juvenile within the meaning of § 43-247(1), (2), or (4) is, pursuant to § 43-286, confined for a longer period than an adult convicted of the same offense could be incarcerated.

Appellant's brief contains no discussion of her first assignment of error, i.e., that her commitment to the Youth Development Center-Geneva is contrary to law. This court normally will not consider assignments of error which are not discussed in the brief. *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989); *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989). However, we have always reserved the right to note plain error. *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988); *State v. Beyer*, 218 Neb. 33, 352 N.W.2d 168 (1984).

> "Plain error" is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

GFH Financial Serv. Corp. v. Kirk, 231 Neb. 557, 562, 437 N.W.2d 453, 456 (1989).

We have noted at the outset the absence of a record of several court proceedings. The separate juvenile court is a court of record. Neb. Rev. Stat. § 43-2,111 (Reissue 1988). In the absence of a valid waiver by all parties to the proceedings, a

verbatim transcript of those proceedings shall be made and preserved. See, also, *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

Furthermore, the court below found the appellant to be a child within § 43-247(1), in other words, a juvenile who has committed a misdemeanor or an act in violation of a city ordinance, other than a traffic offense. The juvenile in this case, a traffic violator, should have been found to be within § 43-247(4). Additionally, we know of no statutory authority for the court to issue a suspended commitment to the Department of Correctional Services, as was done in this case. Finally, Neb. Rev. Stat. § 43-279 (Reissue 1988) requires that the court advise the juvenile of his or her right to counsel, the privilege against self-incrimination, the right to confront witnesses, the right to testify and call witnesses in his or her behalf, the right to a speedy adjudication, and the right to appeal and to have a transcript for such purpose. This appears to be a prerequisite to the acceptance of an in-court admission, which was not done in this case. However, as we have held before, the adjudication is an appealable order, and the time for appeal of that portion of these proceedings has long since passed. *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987).

We note as plain error the primary deficiency, which, although hidden in a maze of statutory redundancy, is the apparent lack of authority to commit a juvenile to the Department of Correctional Services as a status offender, i.e., one under § 43-247(3)(b).

Section 43-286 provides that a juvenile who is adjudicated to be a juvenile described in § 43-247(1), (2), (3)(b), or (4) may have his or her dispositional portion of the hearing continued from time to time under such terms and conditions as the court may prescribe, may be placed on probation subject to the supervision of a probation officer, or may be placed in a suitable family home or institution subject to the supervision of the probation officer. However, § 43-286(2) contains an exception, which provides that "*[e]xcept as provided in section 43-287*, the court may commit such juvenile to the care and custody of the Department of Correctional Services . . . ."

(Emphasis supplied.)

Neb. Rev. Stat. § 43-287 (Reissue 1988) provides:

> Notwithstanding the provisions of subdivision (2) of section 43-286, when any juvenile is found by the court to be a juvenile defined by subdivision (3)(b) of section 43-247, the court may (1) enter such order as it is empowered to enter in the case of a juvenile described in subdivision (1) or (2) of section 43-247, *except that no such juvenile shall be committed to the Youth Development Center at Kearney or Geneva* . . . .

(Emphasis supplied.)

Assuming that the appellant originally had been placed on probation (she was subjected to a suspended commitment, which is not probation), § 43-286(4)(e) provides that if a juvenile is found to have violated the terms of his or her probation, the court may modify the terms of probation, enter any order which could have been made at the time of the original order of probation, or in the case of a juvenile adjudicated to be within the definitions of § 43-247(3)(b), "the court, after considering the dispositions available, may in addition commit such juvenile to the . . . Department of Correctional Services *under section 43-287* . . . ." (Emphasis supplied.) We thus move full circle back to § 43-287, which prohibits the commitment of a subsection (3)(b) juvenile to the Youth Development Center at Kearney or Geneva.

Therefore, it would seem, the statute forbids the treatment of a child in such a setting as the Geneva institution, which apparently was created for the very purpose of dealing with a subsection (3)(b) juvenile, i.e., one who is habitually disobedient, is uncontrolled by his or her parent, or "who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school." § 43-247(3)(b).

We seriously doubt that the Legislature intended to prohibit such a result, particularly when it seems to be that the interests of the juvenile and the welfare of the community demanded such commitment as suggested in § 43-286(2). However, it is not within the province of this court to attempt to interpret what we consider to be the plain and unambiguous language of the

statutory provisions.

Thus, we examine the reasonableness of the commitment in this case. It possibly will restrict appellant's freedom for approximately 18 months for the violation of a traffic rule prohibiting the operation of a motor vehicle without a license.

We must review the findings of the trial court de novo on the record. *In re Interest of Jones*, 230 Neb. 462, 432 N.W.2d 46 (1988); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987).

The court made no findings supporting the commitment other than that the juvenile was adjudged a child "within Subdivision (1) and (3b) of Section 43-247, R.R.S. Nebraska, 1979 Supp. . . . ." It would seem apparent that she was committed not for driving an automobile without a license, but because of her consistent failure to deal with her alcohol abuse problem, including the falsification of attendance certificates at AA meetings; her neglect and the continued deterioration of her school responsibilities; her disregard of various court orders for a period of months; and the perceived abandonment of parental responsibilities by the juvenile's mother. Had the juvenile been lawfully committed to the care of the Department of Social Services as a subsection (3)(b) status offender, we would have little trouble finding an absence of an abuse of discretion by the trial court. However, confinement in the Youth Development Center-Geneva for the sole offense of driving without a license is unreasonable and an abuse of discretion, and cannot stand.

The judgment of the separate juvenile court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHEN M. WATSON, APPELLEE, V. ARCADIAN FOODS, INC., DOING BUSINESS AS THEO'S RESTAURANT, APPELLANT, AND FIRST NATIONAL BANK OF BELLEVUE, APPELLEE.

447 N.W.2d 477

Filed October 27, 1989. No. 87-149.

1. **Real Estate: Forcible Entry and Detainer.** The right to possession of real estate is determined in an action for forcible entry and detainer.
2. **Waiver: Words and Phrases.** Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such a right; or the intentional doing of an act inconsistent with claiming it.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Frank Meares for appellant.

Tamra Wilson Setser, of Erickson & Sederstrom, P.C., for appellee Watson.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and MORAN and BROWER, D. JJ.

BROWER, D.J.

This is an appeal from the district court for Douglas County, wherein restitution of premises was granted to the plaintiff landowner, Stephen M. Watson, against the defendants, Arcadian Foods, Inc., doing business as Theo's Restaurant (Theo's), and the First National Bank of Bellevue (Bank).

On September 20, 1984, Theo's entered into a lease agreement with Watson for a commercial building for a term ending January 31, 1997, unless sooner terminated. Monthly payments of $3,096.25 were to be made by Theo's. On January 9, 1985, Theo's assigned its rights under the lease to the Bank as collateral for a loan. The assignment, made with Watson's consent, specifically provided that the borrower lessee, Theo's, and the lessor, Watson, would not, alone or by agreement between them, modify or terminate the lease without the

consent of the Bank, except through default as provided in the lease. The assignment further provided that in the event Theo's defaulted, Watson had the right to terminate the tenancy in accordance with the terms of the lease. Watson agreed to provide the Bank with 30 days' written notice of such default, and the Bank, during such period, had a right to cure the default. During the 30-day period, Watson would take no action to enforce his claim arising from the default without the consent of the Bank.

Theo's failed to pay the rental installment due June 1, 1986, and on June 9 notice was given by Watson granting Theo's 10 days to cure the default as provided in the lease. Theo's issued a check to Watson for the June rent on June 15, which check was returned for insufficient funds. Watson gave a second notice to Theo's on July 10, granting Theo's 10 days to cure the default. On August 12, a 3-day notice was given by Watson to quit, vacate, and yield possession. Watson filed suit for forcible entry and detainer of property on August 29.

A trial was scheduled for October 23, 1986, but instead, an agreement and stipulation was entered into by the parties, whereby certain payments were made to Watson and the future rents were increased by $1,000 per month in order to clear up the unpaid back rent. The agreement provided that when final payment of back rents was received by Watson, the pending action for restitution would be dismissed. It was stipulated that this was an addendum to the lease and was not a waiver of any of the terms and conditions of the lease, and it provided that Watson could immediately institute proceedings for restitution upon Theo's failure to pay rents when due.

Theo's failed to pay rent for the month of November. On December 1, notice was given to Theo's to vacate for failure to pay rent.

Watson filed a second amended petition in the still pending restitution action, joining the Bank and alleging notice had been served on the Bank on December 19. The matter went to trial on January 22, 1987. The Bank appeared at trial, consented to the restitution, and waived its rights under the assignment. The court-ordered restitution of the premises and the trial on the matters of back rent and damages were deferred

to a later time. From the order for restitution, Theo's brings this appeal. We affirm.

Theo's assigns as error the court's failure (1) to dismiss the action, (2) to find that Watson waived any right under the forcible entry and detainer statute, and (3) to find Watson assigned his interest in the lease to the Bank and was without authority to proceed.

Theo's first assignment of error goes to the trial court's failure to sustain the motion to dismiss, which had been coupled with a request for continuance. Theo's does not assign any error concerning the refusal to continue the hearing.

Watson's action was a summary proceeding under Neb. Rev. Stat. §§ 24-568 et seq. (Reissue 1985), wherein a determination is made as to the right to possession of real estate and the method by which that possession may be restored. This court has held that the right to possession of real estate is determined in an action for forcible entry and detainer. *Towles v. Hamilton*, 94 Neb. 588, 143 N.W. 935 (1913). The procedure outlined in the statutes sets forth notice requirements, which provide that at least a 3-day notice to quit be given prior to the commencement of the action. Section 24-573 provides that only a summons shall be issued stating the cause of the complaint and setting forth the time and place of trial. The statutory proceedings are designed to provide a speedy and summary method for obtaining possession of premises for those rightfully entitled thereto after notice. *Sporer v. Herlik*, 158 Neb. 644, 64 N.W.2d 342 (1954).

The record shows Theo's received the statutory notice and filed an answer to the petition. Trial on the issue was continued, and on the scheduled trial date, October 23, 1986, a stipulation was entered into creating a method by which Theo's could pay back rents, thus, canceling the hearing. Upon Theo's failure to comply with the agreement, Watson, having retained his right to proceed on his initial action, gave additional notice to Theo's and the Bank, and then filed an amended petition.

The record reflects that Watson complied with the statutory steps and that the trial court was correct in overruling the motion to dismiss.

Theo's second assignment of error claims that by accepting

part of the delinquent rent after the commencement of the action for forcible entry and detainer, Watson waived said action. Theo's cites a number of cases holding that where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in performance of the contract, the breach will be deemed to have been waived. *Einot, Inc. v. Einot Sales Co., Inc.*, 154 Neb. 760, 49 N.W.2d 625 (1951); *Barber v. Raichart*, 207 Neb. 278, 298 N.W.2d 359 (1980); *Snyder v. Hill*, 153 Neb. 721, 45 N.W.2d 757 (1951).

However, these cases are not controlling in this factual situation. In each case, the party in default paid the total amount due on the delinquency either before or after commencement of the suit for breach of contract. Here, the parties entered into the stipulation wherein Watson specifically retained his right to proceed in his action for forcible entry and detainer if Theo's failed to carry out the lease provisions.

The stipulation entered into by the parties specifically provided the action was to remain on file and be dismissed only when the total delinquency was paid, an event which never occurred. The record also clearly shows that subsequent to the stipulation, Theo's failed to pay rent, was given a second notice, and was still in default for the month of November at the time of trial.

To be effective, a waiver must be a clear, unequivocal, and decisive act of a party showing such a purpose. See *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984).

> Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such a right; or the intentional doing of an act inconsistent with claiming it.

Id. at 681, 350 N.W.2d at 552.

We find that under the stipulation, Watson retained all of his rights to proceed with the suit on file. At the time the stipulation was entered into, Theo's was still delinquent in the rent payments originally agreed to in the lease. By entering into the stipulation, Watson did not waive any right to proceed in forcible entry and detainer.

Finally, Theo's asserts there was a complete assignment by both Theo's and Watson to the Bank, and Watson had to obtain the consent of the Bank prior to filing an action for forcible entry and detainer. This contention is not correct. Although Watson consented to the assignment, he reserved all of his rights to proceed against Theo's in the event of a default. While Watson agreed to give the Bank notice of Theo's delinquency 30 days prior to commencement of any action to terminate the lease, Watson did not need the Bank's consent to proceed against Theo's.

Theo's also argues that Watson, because of the lease assignment, is not the real party in interest. Neb. Rev. Stat. § 25-301 (Reissue 1985) provides that every action must be prosecuted in the name of the real party in interest. This court has steadfastly held that the statute applies to actions for restitution of real estate. *Gregory v. Pribbeno*, 143 Neb. 379, 9 N.W.2d 485 (1943). Either the lessor or the lessee is a proper party to maintain the action. *Id.*

The Bank was given written notice of the default on December 19, 1986, more than 30 days prior to trial, and took no action to exercise its option to cure the default. The Bank was joined as a party defendant by Watson and appeared at trial, notifying the trial court that it consented to Watson's proceeding with the action to enforce his claim for restitution. Theo's claim that Watson had assigned all of his interest in the lease, and therefore the action was not prosecuted by the real party in interest, is erroneous and without merit.

For the foregoing reasons, the ruling of the trial court is correct and is affirmed.

AFFIRMED.

WILLIAM GRAY, APPELLEE, V. GAIL M. GRAY, APPELLANT.
447 N.W.2d 220

Filed October 27, 1989. No. 87-974.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Donald E. Earnshaw and Horace H. Reynolds IV for appellant.

No appearance for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and MCGINN, D.J.

PER CURIAM.

As part of a property settlement in the district court, the appellant, Gail M. Gray, caused certain shares of a family corporation to be sold to the corporation. The corporation's president, William Gray, Gail's ex-husband, caused corporation notes to be executed in payment of the stock. William agreed in the settlement document that "[s]aid note[s] shall be personally guaranteed by William." The notes were not paid as they came due, and Gail sought to collect the same from William and/or the corporation by various proceedings in aid of execution.

William and the corporation objected to the proceedings, contending in substance: (1) that no judgment has been had against the corporation and that absent such judgment, the corporation is not a judgment debtor; (2) that William has fully performed the promise made in the agreement to "guarantee" the notes, and to enforce the guaranty a separate action is required; and (3) that the corporation notes are not the obligation of William simply by being mentioned in a settlement agreement in a dissolution matter.

We agree with the trial court. Since the claims have not been reduced to judgments, proceedings in aid of executions cannot be maintained.

AFFIRMED.

JACK J. WORTH, APPELLANT, V. TAMRA F. SCHILLEREFF, APPELLEE.

447 N.W.2d 480

Filed October 27, 1989. No. 87-1151.

1. **Negligence: Proximate Cause: Words and Phrases.** Proximate cause of an injury is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces an injury, and without which the result would not have occurred.
2. _____: _____: _____. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and injury.
3. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, and absent an abuse of discretion, the trial court's ruling will be upheld on appeal.
4. **Negligence: Proximate Cause: Proof.** There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that without it the injury would not have occurred, commonly known as the "but for" rule. The second requirement is that the injury be the natural and probable result of the negligence. The third requirement is that there be no efficient intervening cause.
5. **Jury Instructions.** Whether requested to do so or not, the trial court has the duty of instructing the jury on issues presented by the pleadings and the evidence.
6. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
7. **Jury Instructions: Appeal and Error.** The Supreme Court examines an instruction to determine whether it is a correct statement of law.
8. **Words and Phrases.** Reasonable certainty and reasonable probability are one and the same thing.
9. **Jury Instructions: Proof: Appeal and Error.** In order to establish as error the trial court's refusal to give a tendered instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Robert P. Chaloupka, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

Steven W. Olsen, of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Claiming the district court for Scotts Bluff County erred in instructing the jury on intervening cause and standard of proof, Jack J. Worth appeals the trial court's denial of a new trial. We affirm.

"Intervening cause" is better understood when discussed in relation to proximate cause. Proximate cause of an injury is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces an injury, and without which the result would not have occurred. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). "[A]n efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and injury." *Butorac v. Dixon County*, 232 Neb. 598, 600, 441 N.W.2d 620, 622 (1989) (citing *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989)).

A motion for a new trial is addressed to the discretion of the trial court, and absent an abuse of discretion, the trial court's ruling will be upheld on appeal. *Lemke v. Northwestern Public Serv. Co.*, *ante* p. 223, 444 N.W.2d 326 (1989).

On November 6, 1985, appellant was stopped at an intersection in Gering, Nebraska, when his truck was struck from behind by an automobile driven by appellee, Tamra F. Schillereff. Approximately 5 days after the accident, appellant saw Dr. Daryl D. Wills, a chiropractor. Worth complained of acute back pain, overall aching, and some catching in his upper back, as well as an upset stomach. Worth was a patient of Dr. Wills' until April 14, 1986, when appellant changed chiropractors and became the patient of Dr. Thomas K. Tomoi. On September 12, 1986, Dr. Tomoi referred appellant to Dr. Ernest W. Beehler, a neurosurgeon. On September 29, 1986, Dr. Beehler performed a laminectomy at the L4-5 level of Worth's spine.

On April 23, 1987, appellant brought suit against Schillereff to recover damages for the personal injuries he sustained as a result of the accident. In his first cause of action, Worth sought $31,531.65 in special damages, in addition to general damages. In his second cause of action, which was assigned to him by his

wife, Worth sued for the loss to his wife of his services and his consortium. On June 25, 1987, the trial court granted Worth's motion for summary judgment and found Schillereff liable for the accident. The case was ultimately submitted to a jury only upon the issue of damages proximately caused by appellee's negligence.

At the conclusion of the evidence, the trial court instructed the jury on proximate cause, intervening cause, and damages. The trial court instructed that future damages must be "reasonably certain." The jury returned a verdict for Worth in the amount of $7,443.

In his assignments of error, Worth claims the trial court erred (1) in giving that portion of an instruction dealing with efficient intervening cause; and (2) in instructing that Worth must "prove the various elements of damage by the standard, 'reasonably certain', when the standard which has been recognized in this state since 1981 is 'reasonably probable'."

In arguing that it was error to give an instruction on intervening cause, Worth notes that Schillereff did not plead intervening cause as a defense in her answer.

In *Greening v. School Dist. of Millard*, 223 Neb. 729, 735, 393 N.W.2d 51, 56 (1986), we stated that intervening cause was an element of proximate cause.

> "There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that 'without which the injury would not have occurred,' commonly known as the 'but for' rule. . . .
>
> The second requirement is that the injury be the natural and probable result of the negligence. . . .
>
> . . . .
>
> The third requirement is that there be no efficient intervening cause."

See, also, *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975).

Whether requested to do so or not, the trial court has the duty of instructing the jury on issues presented by the pleadings and the evidence. *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988); *Juniata Feedyards v. Nuss*,

216 Neb. 29, 342 N.W.2d 1 (1983). The remaining question, therefore, is whether the evidence supported an instruction on intervening cause.

During the trial, Dr. Wills testified that tests performed after the accident on Worth's cervical thoracic spine led him to conclude that Worth "sustained an acute traumatic cervical thoracic strain, sprain syndrome and an internal derangement of the right shoulder." Dr. Wills further testified that from tests performed on the lumbosacral spine, he felt appellant "had suffered an acute traumatic lumbar lumbosacral strain, sprain syndrome with severe myalgia and lumbalgia."

On cross-examination, Dr. Wills testified that Worth "did not have the classic symptoms of an acute disk herniation but he did have indication of nerve root irritation which could have been discogenic in origin." Dr. Wills attributed the leg pain to a nerve irritation in the lumbar spine, possibly related to sleeping posture. He stated that if the leg pain had been symptomatic of a disk herniation, the pain would be acute and unrelenting. "Usually a disk lesion is exemplified by extreme back and leg pain, more so in the leg. It comes on very acutely from a specific instance, it's not relenting, it does not give up." Dr. Wills also testified that Worth had a preexisting degenerated L5-S1 disk of the lumbar spine that "definitely would predispose him to nerve root irritation if in fact a nerve were impinged or pressed upon."

Other evidence at trial revealed that Worth had suffered an electrical shock on September 3, 1986. As Worth was working in a tree, he touched a branch that was in contact with a 220-volt powerline. Dr. Tomoi's history taken from Worth indicated that the resulting electrical shock caused appellant to jerk backward. Dr. Tomoi was the only person treating Worth immediately before and immediately after the shock incident. Before the electrical shock, Dr. Tomoi diagnosed appellant as having a "hyperextension whiplash region to the lower cervical, upper thoracic spine" and "a mild sprain, strain of the lumbosacral spine." Dr. Tomoi testified that before the shock, appellant did not persistently complain of low back pain. He termed Worth's low back pain a "mild low back irritation." Dr. Tomoi testified that there was no relationship between the severity of the car accident and the severity of Worth's

whiplash. Dr. Tomoi said that the day after the shock, Worth began complaining of sciatic pain. Dr. Tomoi said that sciatic pain was consistent with nerve root irritation at the L4-5 level. Tests performed on Worth by Dr. Tomoi revealed that appellant had suffered a disk protrusion. Appellant was referred to Dr. Beehler.

Worth testified that on September 19, 1986, before seeing Dr. Beehler, a sneeze caused him to experience severe pain in his lower back. On September 21, 1986, appellant was admitted to the hospital for back surgery. Dr. Beehler testified that a sneeze could cause the rupture of a disk which had started to rupture earlier.

Worth relies upon the opinion of Dr. Beehler, who testified that "the car wreck, the accident, was a major factor in probably starting this thing rolling." However, on cross-examination, Dr. Beehler acknowledged that the electrical shock was a factor in the production of the ruptured disk. He declared that if the electrical shock was of a severe magnitude, "it could have produced a total rupture right then and there."

Evidence at trial also showed that Worth had a history of chiropractic treatments, including 28 treatments in 1967, 52 treatments in 1983 after falling from a truck, and 10 treatments in 1984 for low back pain. Dr. Tomoi testified that all these factors were important in evaluating appellant's condition. Worth never told Dr. Beehler of the electrical shock or, apparently, the sneeze. Dr. Beehler did not know of the electrical shock until Worth's attorney informed him of it prior to trial. Evidence also revealed that on December 20, 1985, Worth fell on some ice onto his back. Dr. Tomoi testified that appellant stated that the fall had aggravated his condition.

The testimony of the treating chiropractors, Dr. Wills and Dr. Tomoi, as well as the testimony of the neurosurgeon, Dr. Beehler, provides sufficient evidence to support an instruction on intervening cause. The evidence presented a question of fact for resolution by the jury, and the jury resolved it. "It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses." *Joyner v. Steenson*, 227 Neb. 766,

769, 420 N.W.2d 278, 280 (1988).

Worth's second assignment of error claims that since "the standard which has been recognized [for proof of future damages] in this state since 1981 is 'reasonably probable,' " the trial court erred in refusing to include, as Worth requested, the words "reasonably probable" rather than "reasonably certain" in its damages instruction to the jury. The trial court instructed the jury that if proven by a preponderance of the evidence, damages were to be awarded in an amount of money that would fairly and reasonably compensate Worth for disability and mental or physical pain and suffering "[r]easonably certain" to be experienced in the future. The trial court also instructed the jury that damages proven by a preponderance of the evidence were to be awarded for the value of the society, companionship, conjugal relationship, and services of which Worth's spouse is "reasonably certain" to be deprived in the future.

The Supreme Court examines an instruction to determine whether it is a correct statement of law. *Cassio v. Creighton University, ante* p. 160, 446 N.W.2d 704 (1989). This court has said that "reasonable certainty" and "reasonable probability" are one and the same thing. *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). The instruction given was a correct statement of law.

> In order to establish as error the trial court's refusal to give a tendered instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.

(Emphasis omitted.) *Cassio v. Creighton University, supra* at 177, 446 N.W.2d at 715. Appellant has failed to show that he was prejudiced by the court's refusal to tender the requested instruction.

We conclude that the evidence supported an instruction on intervening cause. The trial court did not err in refusing appellant's request that the instruction on future damages include the words "reasonably probable" rather than "reasonably certain."

The trial court did not abuse its discretion in refusing to grant

appellant's motion for a new trial.

AFFIRMED.

MAURICE A. NICHOLS ET AL., APPELLANTS, V. HOWARD F. ACH, APPELLEE.

447 N.W.2d 220

Filed October 27, 1989. No. 88-038.

1. **Summary Judgment: Appeal and Error.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. In reviewing an order granting summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence.
2. **Principal and Agent: Presumptions.** The knowledge of the agent is conclusively presumed to be the knowledge of the principal.
3. **Malpractice: Limitations of Actions: Damages: Negligence.** Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within 2 years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; provided, if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, then the action may be commenced within 1 year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.
4. **Limitations of Actions: Torts: Time.** Traditionally, a statute of limitations begins to run as soon as the action accrues, and a cause of action in tort accrues as soon as the act or omission occurs.
5. **Limitations of Actions: Time.** A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.
6. _____: _____. For a statute of limitations to begin running, the plaintiff need not have suffered actual damages; however, there must be injury, which is the invasion of a legally protected interest.

7. _____: _____. The point at which a statute of limitations begins to run must be determined from the facts of each case.
8. **Attorney and Client: Malpractice: Negligence: Contracts.** A client has knowledge of his attorney's alleged negligence at the time the client signs the contract.
9. **Contracts: Fraud.** In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. One who enters into a contractual relationship is charged with knowledge of the contract's contents and is bound thereby.
10. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellants.

Douglas Pauley, of Conway, Connolly and Pauley, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

FAHRNBRUCH, J.

Maurice A. Nichols and his three adult children appeal a Saline County District Court's summary judgment ruling that their legal malpractice lawsuit against attorney Howard F. Ach is time-barred by Nebraska's statute of limitations Neb. Rev. Stat. § 25-222 (Reissue 1985). We affirm.

Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. In reviewing an order granting summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence. *State Farm Fire & Cas. Co. v. Victor*,

232 Neb. 942, 442 N.W.2d 880 (1989).

Considering only those facts which are uncontroverted, the record reflects the following.

Nichols and his three children, Gene, Linda, and Julie, were the sole stockholders of Maury Corporation (Maury). Maury was engaged in highway construction for more than 20 years, with its principal place of business in Geneva, Nebraska. John Anderson contacted the senior Nichols and asked whether he and his children would be interested in selling their stock in Maury to Wm. Anderson Co., Inc. (Anderson Company). It was owned by the Anderson brothers, John, Jeff, and Tim, and was involved in mechanical work and utility contracting for municipalities.

Maury's stockholders were interested in selling their stock. They appointed Maurice Nichols (Nichols) to negotiate the sale to Anderson Company of all the outstanding stock of Maury. Nichols also owned another corporation, a ready-mix concrete company, which he hoped to sell to the Andersons, but that sale never materialized.

In analyzing this case, it is well to remember that the knowledge of the agent, Nichols, is conclusively presumed to be the knowledge of the principal, the Nichols children. *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983).

In June or July of 1981, Nichols, along with his accountant, met with the Anderson brothers and their accountant and discussed the sale of the Maury stock. It was agreed that the Andersons would have their attorney draft a stock purchase agreement. Another meeting was scheduled.

Nichols employed Ach, who practiced law in Geneva and Friend, to attend the scheduled meeting and advise Nichols regarding the stock purchase agreement. At or before the meeting, and in any event before he signed the document, Nichols read the final stock purchase agreement. In substance, the agreement provided that all outstanding stock of Maury was being sold to Anderson Company for $200,000 in excess of the book value of the corporation. The total estimated purchase price was $577,762.33. The downpayment was $127,762.33. The $450,000 balance of purchase price was scheduled to be paid in 10 yearly installments—$40,000 for the first 9 years and

the balance of $90,000 on the 10th anniversary of the sale. Interest of 10 percent on the unpaid principal balance was to be paid annually with the installments of principal. The indebtedness was to be represented by notes executed and delivered by Anderson Company proportionally to the stockholders in accordance with the number of shares owned by each stockholder.

Except for placing the stock in escrow, originally the purchase agreement did not provide for security of payment to the stockholders. Nichols knew that Ach "wanted to get some security." At the meeting he attended, Ach, in the presence of Nichols, requested that one or more of the Anderson brothers secure the transaction with a mortgage on farmland. That request was rejected by the Andersons. After the rejection, it was agreed that John and Jeff Anderson would personally guarantee payment of the purchase price and promissory notes, which they did. The purchase agreement was executed some time after the meeting with the Andersons. Before he signed the purchase agreement, Nichols knew there was no mortgage securing the purchase price, and he, at that time, felt the guaranties were sufficient for his purposes under the sale. Nichols' personal guaranty was sufficient when he borrowed money from the bank, Nichols testified in his deposition. He also knew that the Andersons owned a dozen corporations with assets of $5,000,000. Accountants for both the Andersons and Nichols were present at the meeting with the Andersons. Nichols was aware of the contents of Andersons' financial statements before he signed the agreement on August 31, 1981. Nichols testified that he signed the agreement on the basis of what he perceived was the financial strength of the Anderson Company. Nichols also testified that at the time he read and later signed the purchase agreement, he understood he was giving up the voting rights to Maury's stock.

Anderson Company made two annual payments in the combined sum of $80,000, together with interest, to Maury's original stockholders, the Nicholses. By the time the third annual payment was due, misfortune had fallen upon the company. The Andersons were indicted for bid rigging, Nichols testified. Nichols contacted a lawyer, other than Ach, to discuss

Nichols' concerns that Anderson was going to default on the third payment. Nichols and the lawyer met to discuss the matter on July 18, 1984. On August 21, 1984, Nichols and his newly employed attorney met with one or more of the Andersons and Andersons' attorney to discuss Andersons' situation. At that meeting, Andersons' attorney informed both Nichols and Nichols' lawyer that Maury would be a creditor behind the bank. First National Bank & Trust Company of Lincoln was the escrow agent for the stock purchase agreement. Later, because of a potential conflict between the bank and Nichols, Nichols' new lawyer withdrew from the case.

The third payment, together with interest, was payable September 1, 1984. By that time, Nichols knew that Anderson Company had sold some of Maury's assets. Anderson Company did not pay the September installments of principal and interest.

In their lawsuit against Ach, the Nicholses claim that had they been given security, they would have recovered $440,800 by July 1, 1985. Instead, as of July 1, 1985, they claim they only recovered $300,000 and expended $29,200 in attorney fees to collect that amount. They sued Ach for $170,000.

On appeal, the Nicholses allege two assignments of error: (1) The trial court erred in sustaining the motion for summary judgment because there were unresolved issues of material fact, and (2) the district court erred in granting the motion for summary judgment because § 25-222 is unconstitutional.

As relevant here, § 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

The relevant questions under this statute are: Was there an act of malpractice? If so, when did it occur and when did plaintiffs' cause of action accrue? *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). For purposes of disposing of this case, without deciding the issue, we assume there was legal malpractice involved.

Summarized, appellants allege in their petition that Ach provided legal services through August 31, 1981, and failed to inform them that they were unsecured under the stock purchase agreement, failed to advise them of the effect of a personal guarantor's insolvency, and failed to advise the appellants of the effect of granting the stock voting rights to the Anderson Company.

Traditionally, a statute of limitations begins to run as soon as the action accrues, and a cause of action in tort accrues as soon as the act or omission occurs. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). However, the Legislature has tempered the traditional rule, known as the occurrence rule. Section 25-222 requires that an action for malpractice "be commenced within two years next after the alleged act or omission" but contains a provision for deferred commencement "if the cause of action is not discovered and could not be reasonably discovered within such two-year period."

> A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery.

Georgetowne Ltd. Part. v. Geotechnical Servs., 230 Neb. 22, 26, 430 N.W.2d 34, 37 (1988). " 'It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.' " *Sherbeck v. Schaper*, 232 Neb. 754, 762, 442 N.W.2d 364, 369 (1989). For the statute to begin running, the plaintiff need not have suffered actual damages; however, there must be injury, which is the invasion of a legally protected interest. *Rosnick, supra*. "The point at which a statute of limitations begins to run

must be determined from the facts of each case . . . ." *McCook Equity Exch. v. Cooperative Serv. Co.*, 230 Neb. 758, 761, 433 N.W.2d 509, 511 (1988). Under these principles, we find that there are three bases for rejecting the Nicholses' first assignment of error, any one of which is sufficient to bar Nicholses' claim under § 25-222.

First, this court has held under similar circumstances that a client has knowledge of his attorney's alleged negligence at the time the client signs the contract. As we observed in *Smith, supra* at 437, 363 N.W.2d at 530 (quoting *Interholzinger, supra*), " 'Under our law, in the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.' " One who enters into a contractual relationship "is charged with knowledge of [the contract's] contents and is bound thereby." *Interholzinger, supra* at 271, 333 N.W.2d at 899.

It is initially noted that Nicholses do not allege fraud, nor does the record reflect any. Here, the case is even stronger against Nicholses than the cases were against clients in *Smith, supra*, and *Interholzinger, supra*. The evidence is conclusive that Nichols read the purchase agreement before signing it. He is charged with the knowledge of the contents of the contract on August 31, 1981, the date of signing. The statute of limitations bars any action based on legal malpractice 2 years from that date. Nicholses, however, would have this court modify the rule stated in *Smith, supra*, and *Interholzinger, supra*, which raises the second basis for dismissing the Nicholses' claim.

The appellants argue that simply because Nichols signed the contract, he should not be presumed to have been aware of the agreement's deficiencies on the date of signing. Appellants contend that a rule that one understands a contract which he or she signs should be rebuttable by evidence that the contract contained a serious error which could not reasonably have been discovered by a client who was unskilled in the law and who was assured by his attorney that the contract did not jeopardize his interests. Even if the court was inclined to consider modifying the foregoing rule, it would not do so under the facts and

circumstances of this case. The evidence shows unequivocally that Nichols read and understood the purchase agreement before he signed it. The uncontroverted evidence shows that the purchase agreement provided for no security other than placing the stock in escrow and the guaranties and that it transferred the right to vote the stock to the Anderson Company. Moreover, the evidence is conclusive that before he signed the agreement, Nichols knew that the Andersons refused to give the collateral security requested by Ach, that the agreement provided that the buyer would vote all of the shares of stock, and that the Nicholses would retain no voting rights. Before he signed the agreement, Nichols, an experienced businessman, made a deliberate business judgment to accept the personal guaranties of two Anderson brothers. He thought that the personal guaranties were sufficient to protect the appellants. At the time, he was experienced with personal guaranties because he had given them to his bank. The evidence is uncontroverted that in signing the purchase agreement Nichols also relied upon the financial strength of the Andersons' corporations. He had reviewed financial statements of the corporations, which had assets of $5,000,000. The uncontroverted evidence demonstrates that as of August 31, 1981, Nichols was aware that appellants were giving up their stock voting rights and that appellants were unsecured and were depending upon the personal guaranties of the Andersons instead. Therefore, on that date, August 31, 1981, Nichols discovered or reasonably could have discovered Ach's alleged malpractice. Accordingly, a legal malpractice cause of action was barred 2 years thereafter.

There remains the third justification for finding that the Nicholses' cause of action is barred under the statute of limitations. Assuming arguendo that Nichols did not discover or could not reasonably have discovered a cause of action against Ach within 2 years after its occurrence, he did discover facts constituting the basis of the alleged malpractice or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery of Ach's purported negligence no later than August 21, 1984. That was more than a year before Nicholses filed their lawsuit. It is uncontroverted that Nichols was aware

of Anderson Company's financial difficulties and contacted a second attorney on July 18, 1984, concerning the Andersons' possible default under the stock purchase agreement. The undisputed evidence also shows that Nichols was advised by Anderson Company's lawyer on August 21, 1984, that the bank was also a creditor and had priority superior to the Nicholses' claims against the Anderson Company. See *Sherbeck v. Schaper*, 232 Neb. 754, 442 N.W.2d 364 (1989) (holding that knowledge of three mortgages on real estate and a lack of priority was sufficient to trigger the 1-year statute of limitations provided in § 25-222). At that point, August 21, 1984, Nichols was aware of the potential for default by the Anderson Company and that as a creditor, a problem existed concerning appellants' lack of security. Since appellants did not file their cause of action until August 30, 1985, more than 1 year after Nichols acquired this knowledge, their cause of action is barred under the second clause of § 25-222.

There is no genuine issue of material fact. Nichols discovered or reasonably could have discovered the alleged malpractice on August 31, 1981. The uncontradicted evidence also shows that as of August 21, 1984, Nichols discovered Ach's alleged negligence or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery of the malpractice asserted. Summary judgment was proper. The first assignment of error is without merit.

As to appellants' second assignment of error, neither the transcript nor the bill of exceptions shows that the Nicholses claimed § 25-222 was unconstitutional in the trial court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *In re Interest of A.M.H., ante* p. 610, 447 N.W.2d 40 (1989); *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989).

The judgment is affirmed.

AFFIRMED.

CAPORALE, J., concurring.

I agree with the resolution reached in this case but write separately because I think the tenor of the majority's opinion

exalts the holdings of *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983), and *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985), to a level they do not deserve. The majority, by saying "[e]ven if the court was inclined to consider modifying the [*Interholzinger-Smith*] rule, it would not do so under the facts and circumstances of this case," seems to cite those cases for the proposition that a client necessarily becomes aware of a defectively drawn document by being given an opportunity to read it, irrespective of the nature of the defect. Neither *Interholzinger* nor *Smith* so holds.

The relevant act of malpractice claimed in *Interholzinger* was that the attorney had not, as contemplated, excluded certain real property from the operation of an agreement to sell a corporation. In deciding that the malpractice action was time barred, we said that the client had to have known of that failure when he, after the purchaser of the corporation defaulted, signed an agreement listing the subject property for sale as an asset of the corporation. In *Smith*, we said that a cotenant was obligated to inquire about and know the rights of his cotenant in real estate. Limited to their facts, *Interholzinger* and *Smith* stand only for the proposition that for purposes of determining when an action for alleged legal malpractice begins to run, a client must know what lay persons of ordinary intelligence are deemed to know. That is a far cry from saying that in every instance a client has knowledge of his or her attorney's malpractice at the time he or she is given the opportunity to read a document the attorney drew, irrespective of the nature of the malpractice claimed. Were that so, lay persons would need to be as sophisticated in the law as lawyers are required to be. The cardinal rule remains, as the majority acknowledges, that the point at which a statute of limitations begins to run must be determined from the facts of each case. *McCook Equity Exch. v. Cooperative Serv. Co.*, 230 Neb. 758, 433 N.W.2d 509 (1988).

In this case the plaintiffs knew the transaction was not secured and made an informed business decision to proceed on the strength of certain guaranties. Moreover, their unsecured position was confirmed for them by another lawyer more than a year before they instituted suit. What plaintiffs are really

claiming is that their attorney somehow should have prevented them from making what subsequently proved to be a bad business decision. That is patent nonsense.

SHANAHAN, J., joins in this concurrence.

K N ENERGY, INC., APPELLANT, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

447 N.W.2d 227

Filed October 27, 1989. No. 88-937.

1. **Municipal Corporations: Public Utilities: Rates.** A municipal corporation in fixing rates to be charged by a public utility acts in a legislative rather than a judicial capacity.
2. **Appeal and Error.** There can be no appeal from legislative action.
3. **Collateral Attack: Appeal and Error.** The proper method of questioning the validity of legislative action is by collateral attack, that is, by injunction, quo warranto, or other suitable equitable action.
4. **Appeal and Error.** An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated.
5. **Collateral Attack: Appeal and Error.** The validity of a legislative act from which there is no appeal is subject to judicial review through a collateral attack.
6. **Constitutional Law: Courts: Jurisdiction: Equity.** The equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled.
7. **Public Utilities: Rates: Ordinances: Injunction: Equity: Courts.** A proceeding for judicial review of a rate ordinance under Neb. Rev. Stat. § 19-4616(7) (Reissue 1987) of the Nebraska Municipal Natural Gas Regulation Act in the form of a suit to declare the rate ordinance invalid and enjoin the municipality from putting it into effect is a suit in equity in which the validity of the rate is the proper subject of a full hearing de novo in the district court.
8. **Public Utilities: Rates.** In determining the cost of service for a public utility, costs should be allocated to those customers who cause the utility to incur the costs.
9. _____: _____. In determining the capital structure of a public utility, only the debt, stock, and common equity that is used to finance rate-base assets should be included.
10. _____: _____. A fair rate of return for a public utility is one that permits the company to maintain its financial integrity and attract capital on reasonable terms and that permits the company to achieve a level of return comparable to other firms with corresponding risk.

11. **Public Utilities: Rates: Pensions.** Pension expense is a legitimate labor expense and should be included as a part of the cost of service for a public utility.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

M.J. Bruckner, W. Scott Davis, and Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C.; and B.J. Becker and A.R. Madigan for appellant.

Clark G. Nichols and Philip M. Kelly, of Winner, Nichols, Douglas, Kelly and Arfmann, P.C.; Bevin B. Bump, of Bump and Bump; James D. Larson, of Wurst, Pearson, Larson, Underwood & Mertz; James L. Haszard, of McHenry & Watson; and George P. Burke, of Van Steenberg, Myers, Burke & Wilson, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This action was commenced by the plaintiff, K N Energy, Inc. (K N), against the City of Scottsbluff to enjoin the defendant city from enforcing ordinance No. 3071, which established rates to be charged by the plaintiff for natural gas service furnished to customers in the City of Scottsbluff, Nebraska, beginning 30 days after February 22, 1988. Similar actions were commenced against the municipalities of Minatare, Bridgeport, Mitchell, Terrytown, Lyman, Gering, Morrill, Bayard, Lodgepole, Kimball, Potter, Chappell, Sidney, Broadwater, Alliance, Lewellen, Oshkosh, Rushville, Hemingford, Hay Springs, Gordon, Crawford, and Chadron, all of which had adopted ordinances similar to ordinance No. 3071 of the City of Scottsbluff.

Since all 24 cases involved similar questions of fact and law, they were consolidated for trial in the district court. For the same reason, all 24 cases have been consolidated for briefing and argument in this court.

The plaintiff is engaged in the gathering, transmission, distribution, and sale of natural gas and provides natural gas service to customers in each of the defendant municipalities. On

September 1, 1987, pursuant to Neb. Rev. Stat. § 19-4608 (Reissue 1987), the plaintiff filed notices of its intent to change the rates for gas service in 31 municipalities in western Nebraska.

Section 19-4608 is a part of the Municipal Natural Gas Regulation Act, Neb. Rev. Stat. §§ 19-4601 to 19-4623 (Reissue 1987), enacted by the Legislature in 1987. The act prescribes the procedure for filing and establishing or modifying rates for natural gas service to customers within municipalities. None of the parties have raised any issue concerning the validity of the act.

In addition to filing for a rate increase, the plaintiff submitted a "Notice of Proposed Rate Area Boundaries" in accordance with § 19-4606 of the act. Since no objections were made to the proposed rate area boundaries, they became effective as provided in the act. The significance of rate area boundaries is that the act contemplates that rates shall be uniform throughout each rate area.

Since the municipalities failed to take final action within 90 countable days, as provided in § 19-4607(1), the rates proposed by the plaintiff became effective, subject to refund, on December 1, 1987.

As contemplated by the act, the plaintiff supplied detailed information in support of its proposed increase in rates. See § 19-4611.

The 24 municipalities which are defendants in these actions employed Dahlen, Berg & Co., which reviewed the plaintiff's proposed increase in rates and submitted a report to the defendants which proposed rates lower than those requested by the plaintiff. The plaintiff then filed its "rebuttal," as provided in § 19-4616(3).

Thereafter, area rate hearings were held before a hearing officer selected by the defendants, all as provided in § 19-4616(4). The defendants then adopted findings of fact and conclusions of law and rate ordinances, as provided in § 19-4616(6).

Section 19-4616(7) provides:

> Within thirty days of the date of final action by the municipalities within a rate area, a utility may initiate

> proceedings for judicial review of the decision of any municipality in the rate area to the district court. At the time the utility initiates action for judicial review, it shall join in such action as parties all municipalities in the rate area whose actions are being challenged.

Section 19-4602(8) provides: "Judicial review shall mean, but shall not be limited to, injunctive relief and other equitable relief."

The plaintiff then commenced actions against each of the defendants to enjoin enforcement of the rate ordinances.

Section 19-4612 of the act provides in part:

> (1) The municipality, in the exercise of its power under the Municipal Natural Gas Regulation Act to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient, and reasonable natural gas service and to the need of the utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provisions for depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property.
>
> (2) Cost of service shall include operating expenses and a fair and reasonable return on rate base, less appropriate credits.
>
> (3) In determining a fair and reasonable return on the rate base of a utility, a rate of return percentage shall be employed that is representative of the utility's weighted average cost of capital including, but not limited to, long-term debt, preferred stock, and common equity capital.

The plaintiff alleged that the rates in force at the time of its filing for a rate increase

> did not and would not provide K N with revenue sufficient to enable it to meet the cost of furnishing such service, including adequate provision for depreciation on its utility property used and useful in rendering service to customers within the rate area (hereinafter "property"), and to earn a fair and reasonable return upon its investment in such property.

The plaintiff further alleged:

> The adjustments to K N's rate filing in Exhibit 17 are improper, unreasonable and arbitrary. The rates purportedly adopted by the City do not provide K N with a fair and reasonable return upon the reasonable value of the property being used to provide natural gas service to the rate area, are not consistent with findings and conclusions in Exhibit 17 and under the facts alleged in this petition, the rate [sic] purportedly established by Ordinance No. 3071 are not just, not reasonable, inadequate and confiscatory.
>
> . . . By their failure and refusal to establish the new rates requested by K N's Application, the Defendants are acting in a confiscatory and arbitrary manner and are depriving K N of its property without due process of law and are in violation of the Fourteenth Amendment of the Constitution of the United States and in violation of Article I, Section 3 of the Constitution of the State of Nebraska and the statutes of the State of Nebraska, including Section 19-4601, et seq., R.R.S. (Supp. 1987).

In each case, the plaintiff prayed that the court find the rates established by the defendant were not just, not reasonable, inadequate, arbitrary, and confiscatory and did not provide K N with a fair and reasonable return on its property used and useful to provide service to the natural gas consumers in the defendant city; that the court find that any lesser rates than the new rates set out in exhibit 12 were not just, not reasonable, inadequate, arbitrary, and confiscatory; and that the defendant be enjoined and prohibited by proper order of the court from preventing K N from continuing the rates set out in exhibit 12 in force and effect and from collecting the same for natural gas consumption billings until such time as the defendant by proper action passed an ordinance putting the rates set out in exhibit 12 into effect or until such time as the defendant by proper exercise of its regulatory powers established just, reasonable, adequate, and compensatory rates to be charged for gas sold to K N's customers in the defendant city.

The defendants' answers prayed that the plaintiff's petitions be dismissed.

Trial in the district court commenced on July 19, 1988, and was concluded on July 28. The evidence consisted of the rate ordinances, the plaintiff's rate filings with supporting documents, the reports submitted by the defendants, the plaintiff's rebuttals, the records made at the rate area hearings, and the testimony of expert witnesses offered by the parties.

On September 15, 1988, the trial court found that the plaintiff had failed to sustain its burden of proving that the rates established by the defendants were unjust, unreasonable, and confiscatory and dismissed each of the plaintiff's petitions. From those judgments the plaintiff has appealed.

The trial court's judgments made detailed findings on the controverted issues, including the issue of the scope of its review in these actions. The trial court found: "The scope of this Court's review is de novo on the record made at the various rate hearings."

The plaintiff's first assignment of error is that the trial court erred in holding that the scope of its review was de novo on the record made at the various rate hearings.

There are several problems with the trial court's finding as to its scope of review in these actions.

The rate hearings contemplated by the act are not hearings of a quasi-judicial nature, but are for the purpose of assembling and recording information to be used as a basis for later legislative action by the municipalities, which determine the rates to be charged within their jurisdictions.

A municipal corporation in fixing rates to be charged by a public utility acts in a legislative rather than a judicial capacity. *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). As a consequence, the "findings of fact and conclusions of law" referred to in § 19-4616(6) and adopted by each municipality at the time the rate ordinance is adopted are really legislative findings which are not subject to judicial review.

There can be no appeal from legislative action. In *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967), we held that a statute which attempted to provide for an appeal from the action of a city council in an annexation matter was invalid as an attempt to delegate legislative powers to the

judiciary. In that case we noted: "The passage of the ordinance presumes a finding that the conditions and limitations contained in the delegating statute exist or have been complied with. The findings of the city council thereon are legislative and are in a sense merged in the ordinance upon its passage." *Id.* at 236, 147 N.W.2d at 780.

After describing the provisions of the act which provided for an "appeal from the annexation ordinance to the district court," we said:

> A reading of this section shows that its intent was to lodge jurisdiction in the district court by appeal to review the propriety of the legislative action taken by the city. It prescribed the hearing on appeal to be as one in equity de novo, a plain indication that the court was to assume the position of a superior legislative body in hearing the appeal. This is clearly an attempt by the Legislature to impose a legislative function upon the judiciary and is violative of Article II, section 1, of the Constitution. The proper method of questioning the validity of such legislative action is by collateral attack, that is, by injunction, quo warranto, or other suitable equitable action.
>
> . . . .
>
> We think the correct rule is stated in Wagner v. City of Omaha, *supra*, which holds that where the annexation of lands to a city is by legislative action, constitutional and statutory limitations on the nature and extent of the territory to be annexed must be observed, and where such annexation is illegal injunction is a proper remedy. It is our considered opinion that a collateral attack is not only a proper remedy but the exclusive remedy. We do not mean to infer, however, that an appeal will not lie from judicial or quasi-judicial findings of a public officer or administrative board as to whether or not he or it has complied with standards and guidelines imposed for the administration of a legislative act.
>
> In the instant case, the Legislature delegated the power to the city to include by ordinance any contiguous or adjacent lands, lots, tracts, streets, or highways as are

> urban or suburban in character within the city. The exercise of the power excluded the right to annex agricultural lands which are rural in character. The determination by the mayor and council that the lands being annexed were not agricultural lands rural in character is a legislative finding essential to the delegated legislative right to annex the lands. Likewise, the finding that such lands were contiguous or adjacent is a legislative finding necessary to the passage of a valid ordinance. While these legislative findings are necessary to the exercise of the right to annex by ordinance, they are a part of the exercise of the delegated legislative power and are in no sense of the word judicial in character. Since the motive, policy, wisdom, or expediency of legislation is for the Legislature and not the courts, the legislation is presumed constitutional until declared unconstitutional by a proper authority. But an appeal or error proceeding does not lie from a purely legislative act by a public body to whom legislative power has been delegated. If the jurisdictional findings of the legislative body to whom legislative powers have been delegated, such as the mayor and council in the instant case, are not true, and it is so established in a proper action, the ordinance is void as to anyone injured thereby for the reason that it takes property without due process of law.

181 Neb. at 239, 241-42, 147 N.W.2d at 781-82.

The validity of a legislative act from which there is no appeal is subject to judicial review through a collateral attack. *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986). That is the judicial review contemplated by the act, and the only type of judicial review that could be provided by the act. Although the word "appeal" appears at some places in the act, there is no appeal in the technical sense from the action of the defendants in adopting rate ordinances, and there could not be.

This analysis is also supported by the legislative history of the act. During debate on the floor of the Legislature, Senator Landis, a cosponsor of the bill, stated: "A utility desiring judicial review of a municipalities [sic] action in setting natural gas rates is entitled to seek an injunction from the district court

in Lancaster County. The district court will conduct a de novo review of the municipalities [sic] action determining utility rates." Floor Debate, L.B. 663, Urban Affairs Committee, 90th Leg., 1st Sess. 6304 (May 26, 1987).

Later, when asked what items the cities gave up in negotiating the terms of the act, Senator Landis stated on the floor of the Legislature:

> I think most of all they would like to have had a review on the record so that the utility would be bound by the information which had previously been developed and available to the parties. We found, however, some very explicit language in the Williams case saying that this . . . the Legislature does not have the power to invest the courts with that level of authority because of a separation of powers argument that they are in fact were [sic] some constitutional limitations. That probably was significant to the cities.

Floor Debate, 90th Leg., 1st Sess. 6306 (May 26, 1987).

As a final statement of legislative intent, Senator Landis made the following statement just prior to the bill's final reading:

> A municipality acts in the legislative capacity when setting natural gas rates. Legislative acts are presumed valid. Generally, courts cannot inquire into the motive, policy, wisdom, or expediency of legislative acts. However, utility rates must be fair, reasonable, and compensatory, and municipalities must not set rates for natural gas which are arbitrary, unreasonable, or confiscatory. A municipality's legislative action in setting natural gas rates is subject to judicial review only through collateral attack by an equitable or injunctive action to determine whether the rates are fair, reasonable, and compensatory. A court may not set utility rates. A court may only judge whether the municipality acted within the scope of its legislative authority. The Municipal Natural Gas Regulation Act is intended to provide a framework within which municipalities can regulate, determine, and fix natural gas rates. A utility desiring judicial review of the municipality's action in setting natural gas rates is entitled

> to seek such review by means of a collateral attack on the municipal action in the District Court of Lancaster County. Having reviewed the relevant Nebraska case law . . . and having reviewed constitutional concerns relating to due process and the separation of powers, the drafters have endeavored to ensure under this act that those remedies for judicial review available to utilities under current Nebraska law continue to be available upon adoption of this bill, and that the standards and scope of review under current law also remain intact.

Floor Debate, 90th Leg., 1st Sess. 6637-38 (May 29, 1987).

The contention of the defendants in this case is similar to that made by the defendant in *Erickson v. Metropolitan Utilities Dist.*, 171 Neb. 654, 107 N.W.2d 324 (1961). In the *Erickson* case, the issue was whether a rate established by the board of directors of the district was valid. The defendant district contended that if there was competent and relevant evidence before the district court to sustain the action of the district and on which evidence it could not be said that the action was arbitrary and unreasonable, the court could not of right declare the rate invalid. This contention was rejected because the district did not have powers similar to the railway commission. We stated:

> In practice, if not by specific declaration, it has been the rule that public service corporations having power to adopt rules and regulations are required to exact reasonable requirements, the reasonableness of which may be inquired into in a full hearing in the courts. . . .
>
> The conclusion reached is that the question of the validity of the exactions made by the district which are here for review was the proper subject of a full hearing de novo by the district court.

Id. at 660, 107 N.W.2d at 327-28.

The equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled. *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975). See, also, *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 112, 302 N.W.2d 379, 380 (1981), in which we held: "Jurisdiction in suits for

injunction are [sic] in the district courts. Neb. Const. art. 5, § 9. This cannot be legislatively limited or controlled."

These actions are suits in equity, similar to the *Erickson* case, which are collateral attacks upon the rate ordinances adopted by the defendants. The plaintiff had the burden to prove that the rates fixed by the defendants were arbitrary, unreasonable, and confiscatory. *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). To carry this burden the plaintiff had the right to offer any evidence which was relevant to the issue and was not limited to the evidence received at the area rate hearings. Since the trial court received nearly all of the evidence which was offered, and any evidence which was offered but not received appears in the record, the cases may be disposed of on the record made in the district court. The review in this court of the judgments of the district court is, of course, de novo on the record.

The remaining assignments of error relate to the rates which the defendants established by their rate ordinances. The plaintiff contends that the trial court erred in failing to find that the rates established by the defendants are unjust and unreasonable and in failing to enjoin the unjust and unreasonable rates established by the defendants.

The parties are in agreement that a reasonable rate of return on common equity for the plaintiff is 13.5 percent.

The controversy centers around the calculation of the cost of service and the determination of the plaintiff's capital structure and its common equity. The plaintiff contends that the rates adopted by the defendants are unjust, unreasonable, and confiscatory because of erroneous treatment of the following matters: (1) allocation of distribution costs to irrigators who are not within municipal boundaries and who do not use municipal distribution facilities; (2) allocation of some distribution costs on the basis of volume of gas sold rather than by the number of meters served; (3) inclusion of short-term debt as part of K N's capital structure, which reduced K N's requested rate of return on its common equity; (4) failure to include the cost of pension benefits as a cost of service to be allocated among the municipalities; (5) reduction of K N's cash working capital requirement from the approximately $7 million requested to a

negative requirement; (6) failure to include as a cost of service the amount of royalties paid for product extraction and the cost of unrecovered amounts of gas lost from the Huntsman storage field; and (7) amortization of the expense for filing for the rate increase over a period of 3 years instead of allowing K N to collect a 1-year surcharge to cover the rate case expense.

We sustain the plaintiff's contentions except as to the claimed working capital requirement and recovery of the rate case expense.

The plaintiff claims that as a result of the improper allocation of distribution costs by the defendants in calculating the cost of service, the rates which they adopted resulted in reduced revenue for the plaintiff in the amount of $493,314 for rate area 1, $147,669 for rate area 2, $89,790 for rate area 3, and $92,360 for rate area 4. This decrease in revenue decreased the plaintiff's return on common equity by 5.88 percent in rate area 1, 5.1 percent in rate area 2, 3.05 percent in rate area 3, and 3.37 percent in rate area 4. This claimed reduction in the plaintiff's return on common equity is based on its proposed capital structure, which also is a contested issue.

Briefly stated, the plaintiff contends that costs should be allocated to the customers who cause the utility to incur the costs. Edward Cecil, an engineer employed by R.W. Beck and Associates and who prepared the cost of service study for the plaintiff, testified concerning the allocation of distribution costs. Cecil testified that in allocating costs the basic principle is that costs should be allocated among customers who use the facilities. The basic concept is that customers who make use of transmission facilities should pay a portion of the cost of them. If a part of the system does not serve a customer, no costs of the part should be allocated to that customer. This is a generally accepted principle in the industry and is not unique to the plaintiff's case. Cecil testified that Dahlen and the cities violated this cost of service principle by allocating costs of facilities to customers who do not use the facilities. Cecil testified that Dahlen's allocation resulted in costs' being allocated away from customers who use the distribution facilities, and therefore, the costs appeared lower for those customers who were subject to the hearing than the actual costs

of providing service to those customers. The rates adopted by the cities are too low for the plaintiff to recover its costs of providing service.

With respect to the allocation of distribution costs, the plaintiff's principal complaint is that the defendants included irrigators in the group to which distribution costs were allocated. To understand the plaintiff's contention it is necessary to know how a gas company such as the plaintiff operates.

Gas is transported from the wells and gathering points through large pipelines, or mains, 10 to 16 inches in diameter, at high pressure. At the cities, the gas goes through a town border station, where the pressure is reduced from 800 psi (pounds per square inch) to 10 to 35 psi. The town border stations and equipment for sales at wholesale and industrial points are classified as transmission metering and regulating equipment. The gas then moves through a grid of distribution lines to the customer's location, where the pressure is again reduced to perhaps 4 ounces.

Distribution mains are laid out in a grid fashion to serve all customers on the system, so the number of customers using the system has a strong influence on the amount of investment in facilities.

Distribution costs are caused primarily by the number of customers on the system, although some weight should be given to the peak demands placed on the system by the customers served. Distribution costs are normally allocated on a customer basis or some combination of customers and demands during peak periods. Distribution costs should not be allocated on annual volumes because annual volumes do not cause the distribution costs to be incurred.

Irrigators use relatively large quantities of gas during their operating season and, ordinarily, cannot be served from a city distribution system because the pressures are inadequate to deliver gas in the quantities that the engine on an irrigation well pump requires. An irrigator can use service from a city distribution system if the well can function on 5 pounds of pressure. As a result, most irrigators, as well as large industrial customers, are served directly from transmission lines or from

irrigation transmission lines carrying gas at 100 to 300 psi. Thus, irrigators in general derive no benefit from city distribution systems, and city distribution costs should not be allocated to them.

Although the meters which irrigators use are classified as distribution facilities, the costs of those meters are allocated to the irrigators by the plaintiff.

There are approximately 10,000 irrigators in Nebraska, of which only 27 are inside city limits and only a few are downstream from city distribution systems. There are only 124 irrigation meters in rate areas 1, 2, 3, and 4 out of a total of 10,490 in Nebraska. These represent only 1 percent served by the plaintiff's facilities of all the irrigation meters in Nebraska. The vast majority of irrigation meters are in south central and north central Nebraska.

Of the 23 million MCF (thousand cubic feet) of gas sold at retail, irrigators used 5.5 million in a 30- to 45-day period in the summer. In comparison, an average domestic customer uses about 120 MCF per year.

The error in the allocation was compounded by the defendants' allocating distribution costs on a volume basis. When the costs are allocated by the number of meters, as the plaintiff proposed, rate areas 1, 2, 3, and 4 are allocated 27 percent of the total cost of providing service to Nebraska. Thirty-one percent of the municipal customers in Nebraska are located in the four rate areas involved in this case. The total sales for rate areas 1 through 4 was 4,079,121 MCF, or 18 percent of the total sales by volume.

The plaintiff's investment in facilities in the four rate areas totaled 32 percent of its total investment in distribution facilities in Nebraska. The number of meters in the four rate areas was 31 percent. There was a direct correlation of the investment dollars to the number of customers in the rate area. The costs associated with the distribution system are related to the number of customers served by the system.

The defendants used all irrigation meters as part of the denominator in both the allocation by number of meters and the volumetric allocation. The defendants included, in the volume of gas sold, commercial customers who are served from

transmission lines, not distribution lines, and who should not bear costs of the distribution facilities.

The size of the distribution mains cannot be based on the annual volumes, because if it were, the system would be too small to meet the peak demands. Larger pipe costs more money, so it is logical to allocate some of the costs on a demand basis. The annual volume of gas used has no influence on how the distribution system is laid out, but the system is influenced by the peak demands placed on it during the winter months.

The effect of the double allocation made by the defendants' using the wrong number of customers and allocating distribution costs by volume resulted in a cost allocation 11.4 percent lower than that produced by the plaintiff's allocation.

The plaintiff had requested a revenue increase of $886,472 for rate area 1, and the rates set by the defendants allowed only revenue of $230,981; the amount not allowed was $655,491. For rate areas 1, 2, 3, and 4, the plaintiff was unable to recover the following dollar amounts, specifically because of the different distribution cost allocation by Dahlen, which was adopted by the cities in setting the rates: area 1, $493,314; area 2, $147,669; area 3, $89,790; and area 4, $92,360. These amounts total $823,133 of the plaintiff's requested revenue increase of $1,784,527. Approximately half of the requested increase was disallowed because of the allocation factors used by the cities. The incorrect distribution allocations made by the defendants resulted in the rates set by the cities being unjust and unreasonable.

The controversy in regard to the plaintiff's capital structure is whether short-term debt and current maturities of long-term debt and preferred stock should be included as a part of the plaintiff's capital structure. The defendants adopted the recommendation of Dahlen and included short-term debt and current maturities of long-term debt and preferred stock as a part of the plaintiff's capital structure. The plaintiff claims that this resulted in a dilution of its rate of return on common equity and increased the risk factor to investors in the plaintiff's common stock.

It would appear that the determining factor in regard to this issue is whether the plaintiff used short-term debt to finance

assets which make up the rate base.

On September 30, 1985, the plaintiff had no short-term debt. On March 31, 1988, the short-term debt balance was $60.3 million, but during the same period, the rate base declined by $876,112. If short-term debt had been used to finance rate-base assets, the rate base would have increased.

Hassel Sanders, a certified public accountant and the plaintiff's vice president of rates and consolidated accounting, testified that the plaintiff does not finance its rate-base assets with short-term debt. The plaintiff's policy is to use only long-term debt to finance long-term assets. The Federal Energy Regulatory Commission (FERC) does not include short-term debt or current maturities in the capital structure of a company unless the corporation uses short-term debt to finance the rate base.

The plaintiff also offered the testimony of Professor R. Charles Moyer. Moyer, who is a professor of finance in the graduate school of management at Wake Forest University, and who has testified as an expert witness in many rate proceedings, testified about the plaintiff's capital structure and the components of capital upon which it could base its requested rate of return. At the time of trial, the plaintiff's short-term debt balance was $33.5 million. Moyer testified that short-term debt was not a regular portion of the plaintiff's financing, but was used primarily to handle seasonal cash-flow. During the heating season, the plaintiff has a large cash-flow, but after the heating season, cash-flow dwindles and the short-term debt balance builds up. In the last 2 or 3 years, because of seasonal and market changes, the plaintiff performed poorly financially. The current short-term debt balance is being reduced, and Moyer predicted that it would disappear over the next year. Moyer concluded that the plaintiff did not use short-term debt as a substantial, necessary, and regular portion of capital financing.

Moyer testified that some utility commissions and the FERC have included short-term debt in capital structure for three reasons: if the short-term debt is a substantial, necessary, and regular portion of a company's financing; if the short-term debt finances fixed assets includable in the rate base; and if it is

continuous in that it is rolled over regularly in similar amounts from time to time. The plaintiff's use of short-term debt does not meet any of these tests.

Moyer testified that the plaintiff does not use short-term debt to finance fixed assets includable in its rate base. On September 30, 1985, the plaintiff had no short-term debt and a net rate base of $220,814,444. As of March 31, 1988, the net rate base had declined to $219,938,332, but the plaintiff had a short-term debt balance of $60.3 million. The short-term debt could not have financed rate-base assets, since all assets were financed in 1985 when the company had no short-term debt outstanding. Moyer testified that the plaintiff does not roll over its short-term debt with new short-term loans when the old notes become due, but has used the short-term debt to finance fluctuating cash-flow needs.

Sanders testified that the plaintiff's capital structure for rate area 1 included the following components: (1) Long-term debt made up 37.45 percent of total capitalization, and the plaintiff requested a return of 9.93 percent in order to pay the effective interest rate on its 20-year debenture bonds; (2) preferred stock comprised 9.94 percent of the plaintiff's total capital structure, and the dividend return which had to be paid to preferred stockholders to prevent default was 7.49 percent; and (3) common equity was 52.61 percent of the plaintiff's capital structure and was defined as the remaining balance of return dollars available to pay dividends to common stockholders and to reinvest in gas plant additions to continue providing service.

Sanders testified that of the $9.8 million rate base for rate area 1, common stockholders have provided $5,171,940 of the rate base. The final rates adopted by the cities in that area gave common stockholders only 2.69 percent return. From the rate-base amounts for each element of the capital structure, the plaintiff determined the weighted cost of capital by dividing the total return dollars using the rates adopted by the cities. The result for area 1 was that the plaintiff was earning only 5.88 percent. For rate areas 2, 3, and 4, the plaintiff determined it would earn returns of 6.28 percent, 7.31 percent, and 6.8 percent, respectively, on common equity.

Professor Moyer has had experience with utility ratemaking

as an expert on determining capital structure, costs of equity, stream of working capital, and financial liability and integrity. The costs of debt components of capital are usually noncontroversial in that they are embedded costs—such as the costs of interest paid on bonds or dividends paid on preferred stock. The cost of common equity changes over time depending on conditions in capital and financial markets. That cost of common equity is the return that ultimately accrues to shareholder investors in the corporation.

Moyer testified that a fair rate of return is one that permits a company to maintain its financial integrity and attract capital on reasonable terms and that permits the company to achieve a level of return comparable to other firms with corresponding risk. Moyer testified that this definition was developed by the Bluefield Water Works and Hope Natural Gas cases. In *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923), the U.S. Supreme Court held that a public utility is, under the due process clause of the federal Constitution, entitled to the independent judgment of the court as to both law and facts upon review of rates fixed by a public service commission. The Court said:

> The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this court.

262 U.S. at 683.

> The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary.

262 U.S. at 690.

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

262 U.S. at 692-93.

In *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944), the U.S. Supreme Court said:

> The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that "regulation does not insure that the business shall produce net revenues." 315 U. S. p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 345-346. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be

sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Moyer testified that an optimal capital structure for a corporation is one which finds a weighted cost of capital which balances debt and equity, minimizing the cost of capital. The weighted cost of capital is the cost of each component source of capital times the percent that it exists in the firm's capital structure.

Moyer testified that the cost of common equity ultimately determines the financial liability, integrity, and ability of a company to attract capital in financial markets. Once the cost is estimated, it is multiplied by the equity portion of the rate-base assets, which have been financed with equity to get the return dollars needed to provide cash to the equity investors. If the rate of return on equity is inadequate because of too low rates, the ability of a company to attract capital and provide service is impaired. If a corporation does not maintain rates of return competitive with other investments of similar level of risk, an investor will turn elsewhere in the investment market and buy another security.

The capital structure of a company is the permanent source of financing which is used to finance long-term or rate-base assets. Its components include long-term capital as well as long-term preferred and common stock, plus all common equity of the company. A company with 50 percent equity is less risky than a company with 35 percent equity.

In evaluating the rates adopted by the defendant cities, Moyer concluded that none of the rates would provide the level of return that investors can get from other utility companies in the natural gas industry. Moyer concluded that the rates were unfair, unreasonable, and confiscatory. He compared the rate of return allowed the plaintiff by the cities' rates to the return paid on U.S. Government bonds, the lowest risk security. The plaintiff's return was even lower than the return on Government bonds.

Moyer stated that using Dahlen's capital structure, one would have to make a substantial upward adjustment in the required rate of return on equity to reflect the greater financial

risk embedded in the financial structure. In looking at the risk of a company, one compares the amount of debt capital and the amount of equity capital. The greater the proportion of equity, the lower the chance that the company will have financial difficulties. The greater the proportion of common equity, the less volatile earnings will be as operating income increases. The use of more debt in a capital structure increases the volatility of earnings, which is a risk an investor must consider. Investors would demand a higher rate of return if short-term debt was included in the plaintiff's capital structure. He stated that the rates established by the municipalities would impact investors' risk perception of the plaintiff. Fluctuating short-term debt is not a material factor in evaluation of the risk of the company because it is a temporary source of financing.

There is no mention in the Municipal Natural Gas Regulation Act of short-term debt as a component of capital structure to be considered in establishing a rate of return. The act provides that as part of the information to be provided a municipality, the utility must show:

> Rate-of-return and cost-of-capital schedules showing:
>
> (a) Long-term debt, preferred stock, and common equity amounts, ratios, and percentage cost rates for the base year and test year; and
>
> (b) Long-term debt, preferred stock, and common equity amounts at the beginning and end of the base year and test year . . . .

§ 19-4611(5). The utility must also provide rate-base schedules showing beginning and ending balances for the base year and test year of, among other things, "[o]ther rate-base components." § 19-4611(3)(c). The statute makes no other mention of short-term debt as a cost of capital or a consideration in finding a proper rate of return.

As a result of the inclusion of short-term debt and current maturities of long-term debt and preferred stock in the plaintiff's capital structure, the rates adopted by the defendants had the effect of reducing the rate of return on common equity by 1.92 percent for area 1, 1.94 percent for area 2, 2 percent for area 3, and 1.99 percent for area 4.

The issue with regard to pension expense resulted from the

failure of the defendants to include $1,787,712 as a part of the cost of service. This was due in part to confusion caused by the failure of the plaintiff to include this item in the original application and adequately explain this item at the time of area rate hearings.

Part of the problem was caused by a Financial Accounting Standards Board rule that required a portion of the pension expenses to be recorded as prepaid items.

The defendants adopted Dahlen's recommendation of $195,000 as pension expense and further compounded the error by reducing that amount by $90,000.

The plaintiff's actual pension expense for the year ending April 30, 1987, was $2,073,761, and the test year amount was $1,982,896. Pension expense is a legitimate labor expense and should be included as a part of the cost of service. The failure to include the proper amount as pension expense as a cost of service reduced the plaintiff's requested rate of return by 1.4 percent, 1.45 percent, 1.45 percent, and 1.95 percent for rate areas 1, 2, 3, and 4, respectively, based on the plaintiff's proposed capital structure, and reduced by about 10 percent the plaintiff's requested return of 13.5 percent. Alone, this was not a significant factor, but when considered with the distribution allocation and capital structure issues, it contributed to making the rates adopted by the cities unjust and unreasonable.

The issues as to royalties on product extraction and Huntsman unrecovered storage gas resulted from the plaintiff's inadvertent failure to include these items in its application. These items were noted in the rebuttal report and evidence concerning them was presented at the rate area hearings and at the trial in the district court.

At the trial, Sanders testified that the royalties on products extracted were the royalty obligation which the plaintiff pays to the owners of the gas stream for liquids extracted from the gas stream. These products are subsequently sold by the plaintiff and the proceeds credited back to reduce the cost of service. Sanders testified that the royalty obligation for system-wide products extracted was $1,844,393 and for rate area 1 was $26,751. Sanders testified that was a cost of service and to exclude the cost reduced the plaintiff's rate of return on

common equity.

Sanders explained that the Huntsman unrecovered storage expense concerned the Huntsman underground storage field in western Nebraska, where the plaintiff stores gas in the off-season. The costs were the cost of gas that migrated from the Huntsman storage field into an adjacent field. Huntsman sued Marathon Oil, the operator of the adjacent field, to recover the cost of the lost gas and settled with Marathon for $11 million. However, that settlement did not recoup the entire value of the gas, and the administrative law judge in that case found that the $2.1 million in remaining value could be recovered over a period of 5 years.

The failure to include these two items as a cost of service reduced the plaintiff's rate of return on common equity by .48 percent, .48 percent, .44 percent, and .64 percent for rate areas 1, 2, 3, and 4, respectively.

The defendants were aware of the exclusion of the Huntsman unrecovered storage amounts and the royalties on products extraction at the time the plaintiff's rebuttal report was filed on January 7, 1988. The rate area hearings were held later that month. The defendants had time to respond to the revised cost of service study prepared by the plaintiff, and the amounts should have been included as a cost of service and allocated to the rate areas in question. The failure to do so magnified the unjust and unreasonable rates adopted by the cities.

The remaining two items in dispute relate to the plaintiff's claim that $7 million should have been included as the cost of working capital and that it should have been allowed to recover the rate case expense in 1 year rather than over a 3-year period. We find that neither contention has merit.

With respect to the working capital issue, the plaintiff relied on a rule that assumes that a utility carries its customers for a 45-day period before it collects from its customers. The FERC now requires utility companies to perform full lead-lag studies if they request positive cash working capital. If no lead-lag study is performed, the FERC presumes a zero cash working capital.

Sanders testified that cash working capital is an investment in funds necessary to pay bills as they come due prior to the time

the cash is collected from customers. If there is a cash working capital requirement, it is relevant to the rate base and can be included as a cost of service. The plaintiff used the one-eighth formula, also called the 45-day rule, to determine its cash working capital needs.

A lead-lag study determines what the actual working capital requirement is, if any. The lead is the period of time between when the plaintiff receives supplies and goods and the time it pays for the goods. Lag is the time period between when the plaintiff renders service to the customer and the time it collects the bill for the service.

Although the study made by Dahlen may have been unreliable, that did not establish that the plaintiff had a positive working capital requirement.

As to rate case expense, the rates adopted by the defendants allow the plaintiff to recover the expense of the rate case by a surcharge made over a period of 3 years. The plaintiff proposed a 1-year surcharge to recover the rate case expense. The plaintiff claims that the rate case expense affects the plaintiff's return on common equity by reducing it .27 percent, .27 percent, .26 percent, and .37 percent for rate areas 1, 2, 3, and 4, respectively. Apparently, this reflects what the plaintiff would lose on interest earned if the funds were collected in 1 year. Sanders admitted, however, that the plaintiff would still recover the proper amount if the surcharge was spread over a 3-year period.

The statute does not provide any specific method for utilities to collect rate case expense, except to allow for its collection. § 19-4617(1)(b). It is reasonable that the surcharge be amortized to reflect the actual cost of the rate case expense.

The trial court found that the cities' taking Dahlen's suggestion and amortizing the rate case expense over 3 years was not arbitrary or unreasonable. We reach the same conclusion.

From our de novo review of the record, we conclude that the rates adopted by the defendants in rate areas 1, 2, 3, and 4 are unreasonable and confiscatory. The judgments are reversed and the causes remanded with directions to enter judgments granting the plaintiff the injunctive relief requested.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., concurring.

Injunctive relief for K N Energy, Inc., is the correct disposition of this appeal. However, in reaching the correct result, the majority refers to the content of the Nebraska Municipal Natural Gas Regulation Act, Neb. Rev. Stat. §§ 19-4601 et seq. (Reissue 1987), enacted in 1987; for example, "There is no mention in [the act] of short-term debt as a component of capital structure to be considered in establishing a [reasonable] rate of return," and "The statute makes no other mention of short-term debt as a cost of capital or a consideration in finding a proper rate of return." By those and other references to the content of the Nebraska Municipal Natural Gas Regulation Act, the majority has attributed unnecessary and unwarranted significance to the act in relation to this appeal.

Quite apart from the Nebraska Municipal Natural Gas Regulation Act, the true foundations for injunctive relief regarding a utility rate are the guarantee of due process, see Neb. Const. art. I, § 3, and U.S. Const. amend. XIV, and a district court's constitutionally conferred equity jurisdiction, namely: "The district courts shall have both chancery and common law jurisdiction . . . ." Neb. Const. art. V, § 9.

On several occasions, this court has reiterated the longstanding constitutional premise that pursuant to the power conferred by Neb. Const. art. V, § 9, a district court has equity jurisdiction, which exists independent of statute and is exercisable without legislative enactment. See, *State, ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933); *State v. Odd Fellows Hall Ass'n*, 123 Neb. 440, 243 N.W. 616 (1932); *Hall v. Hall*, 123 Neb. 280, 242 N.W. 607 (1932); *Matteson v. Creighton University*, 105 Neb. 219, 179 N.W. 1009 (1920).

In *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 690, 43 S. Ct. 675, 67 L. Ed. 1176 (1923), the U.S. Supreme Court stated: "[W]hether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power" depends on whether the imposed rates are "confiscatory, and their enforcement deprives the public utility of its property in violation of the Fourteenth Amendment." Injunctive

protection for a utility concerning a confiscatory rate was acknowledged in *Kansas-Nebraska Natural Gas Co. v. City of St. Edward*, 167 Neb. 15, 23, 91 N.W.2d 69, 74 (1958), when this court recognized the availability of an injunction as part of a district court's equity jurisdiction to prevent " 'unreasonable delay in putting an end to confiscatory rates . . . .' " (Quoting from *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 46 S. Ct. 408, 70 L. Ed. 747 (1926).)

After an examination of the Nebraska Municipal Natural Gas Regulation Act in relation to the present appeal, the words of Daniel Webster, echoing Brougham's observation, are indeed appropriate: "What is valuable is not new, and what is new is not valuable." The valuable constitutional role of the judiciary in connection with the ratemaking process is not new. See, *Bluefield Co. v. Pub. Serv. Comm., supra*; *Kansas-Nebraska Natural Gas Co. v. City of St. Edward, supra*. The recently enacted Nebraska Municipal Natural Gas Regulation Act has little value, if any at all, concerning judicial activity in reference to the ratemaking process, which still remains a legislative function or activity. See *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). Any legislative attempt to involve a court in establishing a utility rate has serious constitutional implications.

Under the circumstances in the present appeal, municipal failure to adopt an ordinance affording a reasonable rate of return on the value of K N's property used for public service imposed a confiscatory rate on K N and is state action which deprives K N of its property, contrary to the constitutional guarantee of due process. Injunctive relief prevents such unconstitutional confiscation.

Even if the Nebraska Municipal Natural Gas Regulation Act had never been enacted, the injunction granted to K N would be constitutionally authorized and available in a district court's equity jurisdiction. Any use of the act to determine the present appeal is seduction by legislation.

CAPORALE, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. ONE 1987 TOYOTA PICKUP, APPELLEE, DENNIS R. JURGENS, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. DENNIS R. JURGENS, APPELLANT.

447 N.W.2d 243

Filed October 27, 1989. Nos. 88-979, 88-980.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong.
2. **Constitutional Law: Search and Seizure: Motor Vehicles.** A motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field.
3. **Constitutional Law: Search and Seizure: Actions.** The exclusionary rule applies to forfeiture actions.
4. **Search Warrants: Affidavits: Probable Cause.** Where an affidavit used for the purpose of obtaining a search warrant includes illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant.
5. **Criminal Law: Trial: Evidence: Appeal and Error.** Error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Judgment in No. 88-979 reversed, and cause remanded for a new trial. Judgment in No. 88-980 affirmed.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee State.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

After a bench trial on September 19, 1988, appellant, Dennis R. Jurgens, was found guilty of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound (case No. 88-980). Subsequently, Jurgens' 1987 Toyota pickup was condemned in a forfeiture action brought by the State pursuant to Neb. Rev.

Stat. § 28-431 (Reissue 1985) (case No. 88-979). Jurgens appeals from both determinations; the appeals have been consolidated in this court.

For the reasons set forth below, both criminal convictions are affirmed. The forfeiture order is reversed and remanded for a new trial.

On October 23, 1987, the Nebraska State Patrol conducted a vehicle check stop selective at the junction of Highways 4 and 99 in Pawnee County, Nebraska. This check stop selective was conducted by four troopers and was to last from 10 a.m. to noon. A "selective" is a concentration of officers in a certain area for a particular purpose. The purpose of this selective was to check drivers for licensing and vehicles for registration and equipment violations. All vehicles were required to stop, whereupon the license, registration, and vehicle were inspected.

That morning, Jurgens was a passenger in a 1987 Toyota pickup driven by Michael Harms. Jurgens was the registered owner of the pickup. At approximately 11:15 a.m., the vehicle stopped at the check stop, where it was inspected by Troopers Gill and Chrans. Upon approaching the passenger compartment of the vehicle, Trooper Gill detected a strong marijuana odor and noticed a "marijuana substance" on the seat. During the course of their inspection of the pickup's exterior safety equipment, Troopers Gill and Chrans observed, through windows on the vehicle's camper shell, several filled canvas bags. A marijuana leaf was seen on top of one of the bags.

Consequently, Jurgens and Harms were arrested and taken to the Pawnee County jail, and the pickup was impounded and stored at a local auto body shop. That afternoon, Troopers Gill and Chrans obtained a search warrant for the pickup based upon their observations of the pickup earlier that day. A search of the vehicle uncovered large quantities of marijuana and various instruments used in cultivating marijuana.

That same day, Nebraska State Patrol Investigator Dishong obtained a search warrant for Jurgens' farm, located near Table Rock, Nebraska. Investigator Dishong had been investigating marijuana cultivation on the farm since July 1987. On several occasions he made surreptitious inspections of the premises,

finding marijuana in various stages of cultivation. The affidavit used to obtain this search warrant detailed Investigator Dishong's extensive investigations and observations of marijuana cultivation on the Jurgens farm. It also contained a one-paragraph reference to the results of the vehicle search conducted earlier that day. A search warrant was issued, and a subsequent search of the farm uncovered large quantities of marijuana and equipment used to produce marijuana.

On January 13, 1988, informations were filed against both Jurgens and Harms. On April 11, Jurgens filed a motion to suppress all evidence discovered as a result of the seizure of the pickup. On April 20, a hearing on this motion was held. Considerable testimony was elicited concerning the State Patrol's method of establishing and conducting the check stop selective. The motion to suppress was later overruled.

On September 19, both Jurgens and Harms were tried at a bench trial. The court admitted, over both defendants' continuing objection, all evidence obtained as a result of the seizure of the pickup at the check stop, including evidence obtained as a result of the search of Jurgens' farm. Jurgens was found guilty of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound. He was subsequently sentenced, respectively, to terms of imprisonment of not less than 3 nor more than 10 years and not less than 1 nor more than 3 years, these sentences to run concurrently.

On October 30, 1987, the State initiated forfeiture proceedings against the pickup pursuant to § 28-431. In his answer, Jurgens contended that the vehicle was seized in violation of the fourth amendment to the U.S. Constitution. This issue was treated as a motion to suppress related to the unconstitutional seizure of the vehicle and was considered in the motion to suppress hearing conducted in the criminal case on April 20. The motion was overruled. By stipulation of both parties, evidence adduced at the suppression hearing and at the criminal trial was considered as the sole evidence in the forfeiture determination. On November 14, 1988, the trial court ordered Jurgens' pickup forfeited.

Jurgens appeals from both of these decisions. His sole assignment of error is that the trial court erred in overruling his motions to suppress.

This court has stated that in determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Marcotte, ante* p. 533, 446 N.W.2d 228 (1989). Our review of the record in this case does not disclose whether the trial court made factual findings. In any event, it is not necessary for this court to examine those findings, if any, because it is evident that the trial court erroneously applied the law in overruling the motions to suppress.

Initially, we note that standing is not an issue in this appeal. The State has conceded that Jurgens has standing to challenge the search and seizure of his vehicle.

In *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986), the defendant was convicted of driving while under the influence of alcohol after he was arrested at a vehicle check stop. This check stop was established and conducted by several patrolmen and a sergeant from the Omaha Police Division. These officers in the field were free to determine when, where, and how to establish and operate the check stop and were not acting under any standards, procedures, or guidelines promulgated by the police department or other law enforcement agency. This court held, in the majority opinion, that the check stop was constitutionally infirm because "a driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field." *Crom, supra* at 277, 383 N.W.2d at 463. Thus, the defendant in *Crom* was unreasonably seized in violation of the fourth amendment to the U.S. Constitution.

On the facts of this case, it is clear that the check stop was established at the unfettered discretion of officers in the field. Originally, the selective's enforcement list promulgated by the Beatrice office of the State Patrol indicated a "roving Patrol" selective for October 24, 1987. This list was promulgated by Trooper Morris and approved by Lieutenant Winkler on September 23, 1987. At some point after September 23, but before October 23, Sergeant Nedley changed the date of the selective from October 24 to October 23 to allow him to

participate in the selective. Sergeant Nedley is the immediate supervisor to Troopers Gill and Stake and was one of four troopers involved in conducting the check stop selective. The new selective date was never resubmitted to anyone in the State Patrol command structure for reapproval. The State Patrol command structure was never aware that a selective of any type would be conducted on October 23.

Sergeant Nedley testified that the new selective, which was to be conducted on October 23, was to be a roving patrol selective. However, the testimony at the suppression hearing shows that Trooper Stake, on the morning of October 23, made the decision to change the selective from a roving patrol selective to a check stop selective. Trooper Stake was present and involved with conducting the check stop and was not in a supervisory capacity. Sergeant Nedley testified that when he arrived at work on the morning of the 23d, he expected to engage in a roving patrol selective. Shortly after arriving at work, he learned that Trooper Stake had decided to change the roving patrol selective to a check stop selective. Sergeant Nedley testified that he had no prior knowledge of the change, but that he did not object to the change.

Moreover, the evidence clearly establishes that Trooper Stake also made the decision as to when and where the check stop would be conducted. None of Trooper Stake's supervisors made this decision. Lieutenant Reitz, who on October 23 was administrative lieutenant for the headquarters troop traffic division in Lincoln, testified that he did not choose the location. Trooper Balthazor, who on October 23 was on temporary assignment as duty sergeant in the Lincoln office, testified that Trooper Stake was solely responsible for choosing the time and location of the check stop. On cross-examination the following colloquy took place between Trooper Balthazor and Jurgens' attorney:

> Q Now, the — the General Operations Order also proceeds to indicate that the site of the vehicle check stop will be chosen by the supervisor at the time he decides to order such vehicle check stop. I take it you did not choose this location.
>
> A It was chosen — It was called in by Trooper Stake and

he asked for approval for this location and it was approved at that time —

Q Okay.

A — for this location.

Q You didn't check the locat- — You didn't choose the location, he did.

A Yes.

Q And he is one of the officers who was involved in the vehicle check stop, or was scheduled to be. Is that right?

A Yes, he is.

Q Did you know anything before receiving this call from Trooper Stake that Trooper Stake and these other officers intended to conduct a — a vehicle check at the intersections of Highways 99 and 4 on this date?

A No, I did not.

Q Okay. Let me make sure I understand, and I think this will just summarize it. Apparently you received a telephone call from Stake around 7:15 in the morning. Is that correct?

A Yes, sir.

Q On the 23rd. And what Stake said to you was, in essence, we want to conduct a vehicle check; we want to do it at the intersections of Junctions 99 and 4; we want to do it between 1000 hours and 1200 hours on that date; and here are the officers that are gonna be involved by number. Is that correct?

A Yes.

Q Did he give you any other information?

A No, sir.

In addition, at no time was affirmative approval given the troopers in the field to establish and conduct the check stop. At 7:15 a.m. on October 23, Trooper Stake contacted the State Patrol office in Lincoln and left a message that a check stop selective would be conducted that morning. It was the understanding that if the troopers in the field did not receive communication to the contrary, approval was to be assumed. Trooper Stake testified that he never received any sort of affirmative approval from the Lincoln office regarding the October 23 check stop selective. The record indicates that no

trooper involved in the check stop ever received affirmative approval from anyone in the State Patrol command structure.

Based on this evidence, it is clear that the troopers in the field acted with unchecked discretion when they established and conducted the check stop selective. The date, time, location, and type of selective were chosen by certain troopers in the field who conducted the check stop selective, without the State Patrol high command's being involved. Moreover, once the specifics of the check stop were determined by the troopers, no affirmative approval authorizing the check stop selective was ever given by supervisory personnel within State Patrol headquarters. Because of these facts, Jurgens' reasonable expectation of privacy "was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field." *State v. Crom*, 222 Neb. 273, 277, 383 N.W.2d 461, 463 (1986). We hold that Jurgens was unreasonably seized in violation of the fourth amendment to the U.S. Constitution. Thus, the trial court erred in overruling Jurgens' motion to suppress evidence seized pursuant to the check stop selective.

We note further that several years prior to 1987, the Nebraska State Patrol promulgated the general operations manual for vehicle check stops. The policy of the State Patrol, as indicated by this manual, is that "vehicle check stops will be handled with the least intrusion possible and without an unconstrained exercise of discretion." In regard to procedure, the manual provides in pertinent part:

> 2. The initial decision to conduct a vehicle check stop must be made by a neutral source, such as a supervisor who is not involved in conducting the operation in the field.
>
> a. Such decision will be communicated to the officers in the field who will conduct the stops at least 2 hours in advance.
>
> . . . .
>
> 4. The site of the vehicle check stop will be chosen by the supervisor at the time he decides to order such vehicle check stop.

Presumably, this manual was formulated to guide the State Patrol in the wake of *Delaware v. Prouse*, 440 U.S. 648, 99 S.

Ct. 1391, 59 L. Ed. 2d 660 (1979), and its progeny. It appears the manual would meet the constitutional requirement of *State v. Crom, supra*. However, merely having such rules in effect, without adhering to these rules, is not enough. When the State Patrol disregards its own rules, the troopers in the field are free to act with unconstrained discretion.

We also hold that the trial court erred in overruling the motion to suppress Jurgens' Toyota pickup as evidence in the forfeiture action. We have determined that Jurgens was unreasonably seized in violation of the fourth amendment to the U.S. Constitution. Evidence which is obtained in violation of the fourth amendment may not be relied on to sustain a forfeiture. *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1885). The U.S. Supreme Court has held that the exclusionary rule applies to forfeiture actions. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965). Because Jurgens was seized in violation of his fourth amendment rights, the trial judge erred in failing to suppress the Toyota pickup as evidence in the forfeiture determination.

Jurgens also contends that the trial court erred in admitting evidence obtained from a search of Jurgens' real property pursuant to a search warrant. He argues the evidence is tainted and therefore inadmissible because the affidavit upon which the search warrant was obtained included information regarding the marijuana found in the pickup. He urges that the evidence from the search of the real property was not derived from a source independent of the initial illegal search and seizure.

Jurgens' contentions are without merit. This court has held that where an affidavit used for the purpose of obtaining a search warrant includes illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant. *State v. Guilbeault*, 214 Neb. 904, 336 N.W.2d 593 (1983); *State v. Welsh*, 214 Neb. 60, 332 N.W.2d 685 (1983). If the lawfully obtained facts establish probable cause to issue the warrant, then there is no fourth amendment violation.

In the present case, an examination of the affidavit discloses that even if the reference to the search of Jurgens' vehicle is disregarded, there were more than ample independent facts contained in the affidavit which would have justified the trial court in issuing a search warrant. Investigator Dishong submitted an affidavit which detailed observations of marijuana cultivation made during an extensive investigation of Jurgens' real property. This investigation was conducted in its entirety before the October 23 check stop selective. The affidavit contained a one-paragraph reference to the marijuana discovered in the search of the vehicle. Clearly, the lawfully obtained facts contained in the affidavit would have provided sufficient probable cause upon which to issue a search warrant. The trial court properly admitted evidence obtained as a result of the search of Jurgens' real property.

We hold that the State Patrol, in conducting the October 23 check stop selective, unreasonably seized Jurgens in violation of the fourth amendment to the U.S. Constitution. Thus, the trial court erred in overruling Jurgens' motions to suppress evidence obtained as a result of the stop. However, with respect to the criminal convictions, this error is harmless. This court has stated that error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). The search of Jurgens' real property, pursuant to the valid search warrant, uncovered 120 pounds of marijuana, along with elaborate equipment used to manufacture and distribute marijuana. This admissible evidence provides an ample basis upon which Jurgens could have been convicted of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound. We are convinced the trial court's error was harmless beyond a reasonable doubt. Therefore, both criminal convictions are affirmed.

However, the trial court committed reversible error in overruling the motion to suppress Jurgens' pickup as evidence in the forfeiture action. To determine if double jeopardy

principles apply, we must inquire whether the forfeiture statute is criminal and punitive or civil and remedial. The U.S. Supreme Court, in *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), has stated that this inquiry proceeds on two levels. First, a court determines whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or another. Second, where Congress has indicated an intention to establish a civil penalty, a court inquires further whether the statutory scheme was so punitive, either in purpose or effect, as to negate that intention.

We conclude that § 28-431 is criminal in character. Therefore, double jeopardy principles apply. Recognizing this, however, the trial court's error in admitting evidence obtained in violation of Jurgens' constitutional rights is properly characterized as trial error, which does not bar retrial of the forfeiture determination after this reversal. See *State v. Chambers, ante* p. 235, 444 N.W.2d 667 (1989). For this reason, the forfeiture order is reversed and the cause remanded for a new trial.

JUDGMENT IN NO. 88-979 REVERSED, AND CAUSE REMANDED FOR A NEW TRIAL. JUDGMENT IN NO. 88-980 AFFIRMED.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. GERALD S. BOHAM, APPELLANT AND CROSS-APPELLEE.

447 N.W.2d 485

Filed October 27, 1989. No. 89-054.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Hearsay.** A statement of a party defendant is not hearsay.
3. **Appeal and Error.** An issue not properly presented and passed upon by the trial

court may not be raised on appeal.

4. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. Its review is limited to an examination of the county court record for error or abuse of discretion.
5. **Criminal Law: Motor Vehicles: Intent: Words and Phrases.** Any person who drives any motor vehicle in such a manner as to indicate an *indifferent or wanton disregard* for the safety of persons or property shall be guilty of reckless driving.
6. _____: _____: _____: _____. Any person who drives any motor vehicle in such a manner as to indicate a *willful disregard* for the safety of persons or property is guilty of willful reckless driving.
7. **Words and Phrases.** "Willful" means intentional.
8. **Criminal Law: Motor Vehicles: Proof.** For there to be willful reckless driving, it is not necessary for there to be property damage or injuries inflicted.
9. **Verdicts: Appeal and Error.** A finding of guilty by the trier of fact will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a guilty finding.

Appeal from the District Court for Douglas County, J. PATRICK MULLEN, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court reversed, and cause remanded with directions.

Marc B. Delman for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Gerald S. Boham appeals and the State cross-appeals the Douglas County District Court's finding that Boham was guilty of reckless driving.

Boham claims he should not have been convicted of any traffic offense. The State claims that when Boham appealed to the district court, the Douglas County Court's finding that Boham was guilty of *willful* reckless driving should have been affirmed.

We vacate the district court's judgment and remand the cause to that court with directions to affirm the Douglas County

Court's conviction and sentence of Boham. After a bench trial in the county court, Boham was fined $100 and sentenced to jail for 30 days, and his motor vehicle operator's license was suspended for 365 days.

In his assignments of error, Boham claims the county court and the district court erred in (1) allowing Keith Bement to testify to hearsay, and (2) not dismissing the complaint due to the inaccurate and perjured affidavit of the complaining witness.

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. See, *State v. Wokoma, ante* p. 351, 445 N.W.2d 608 (1989); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

Taking the view most favorable to the State, the record reflects the following. Boham was charged in the Douglas County Court with willful reckless driving on July 26, 1988, in Omaha. The complainant, Jay Iske, was employed as a nonunion truckdriver for Brown Transfer. At all times relevant herein, Brown Transfer was involved in a labor dispute with its union employees. Although Boham was not a Brown Transfer employee, he supported the striking union members. Before July 26, Iske, who did not know the defendant, had encountered Boham. At that time, the defendant used his black Thunderbird automobile to block Iske's truck. Boham moved the Thunderbird only after a security guard asked him to move it.

The next time Iske encountered Boham was on July 26, while Iske was driving home from work in a vehicle that had no license plate. Just as Iske entered an entrance ramp to Interstate 80, the defendant drove his Thunderbird in front of Iske's vehicle and then proceeded up the ramp slowly. Iske had to apply the brakes of his vehicle. Once on the Interstate, Iske drove to the extreme left lane in an effort to accelerate his vehicle. There was a semi-truck in the middle lane. Boham was

in a lane to the right of the truck. When Iske accelerated around the truck, the defendant accelerated, drove around the right side of the truck, and cut off Iske before Iske could get too far in front of the truck. To avoid being struck by the defendant's vehicle, Iske was forced to apply his brakes and swerve, at least partially, off the traveled portion of the highway, so that he "was on the dirt temporarily."

When Iske was able to completely return to the traveled portion of the highway, Boham drove alongside him and shouted obscenities at Iske for some distance. Iske tried to elude Boham by pulling onto the entryway of an exit ramp, but Boham followed him. At the last minute, Iske swung back onto the Interstate. Boham also turned back onto the Interstate, followed Iske for some distance, and then drove alongside him again. Iske turned off the highway and onto Hamilton Street, where he stopped to find out what the defendant wanted. Boham told Iske that he was "screwing these union guys out of their job." The defendant asked Iske why he wanted to be a "scab." Boham warned Iske that "if he'd seen me in a personal vehicle or on my motorcycle, that he would make sure I didn't go anywhere." Iske filed a complaint against Boham.

Boham's first assignment of error claims that his hearsay objection to certain testimony of witness Keith Bement should have been sustained. Bement, a security guard who knew Boham, testified that on or about August 1, 1988, he heard Boham tell some people that the defendant had a "run in" with Iske. The objection and assignment of error have no merit. A statement of a party defendant is not hearsay. Neb. Rev. Stat. § 27-801(4)(b)(i) (Reissue 1985).

Defendant's second assignment of error claims that the trial court "erred in not dismissing the complaint due to the inaccurate and perjured affidavit of the complaining witness," Iske.

Although the defendant challenged Iske's credibility by cross-examining him in regard to a purported affidavit, parts of which Iske denied dictating, the document was never introduced in evidence. There is nothing in the record of the trial court reflecting that Boham moved to dismiss the case because of the "inaccurate and perjured affidavit of the

complaining witness." An issue not properly presented and passed upon by the trial court may not be raised on appeal. See *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988). Boham's second assignment of error is meritless.

The State's cross-appeal claims that the district court erred in remanding the cause to the county court for sentencing on the lesser offense of reckless driving.

"[U]pon appeal from county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. . . . [Its] review is limited to an examination of the county court record for error or abuse of discretion." *State v. Horr*, 232 Neb. 380, 382, 441 N.W.2d 139, 141-42 (1989); *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988).

The distinction between reckless driving and willful reckless driving is determined by the driver's state of mind. "Any person who drives any motor vehicle in such a manner as to indicate an *indifferent or wanton disregard* for the safety of persons or property shall be deemed to be guilty of reckless driving." (Emphasis supplied.) Neb. Rev. Stat. § 39-669.01 (Reissue 1988).

"Any person who drives any motor vehicle in such a manner as to indicate a *willful disregard* for the safety of persons or property is guilty of willful reckless driving." (Emphasis supplied.) Neb. Rev. Stat. § 39-669.03 (Reissue 1988). "Willful" means intentional. NJI 14.10. See, also, *State v. Gascoigen*, 191 Neb. 15, 213 N.W.2d 452 (1973); *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

Boham, at the entry ramp to Interstate 80, drove in front of Iske and forced him to brake his vehicle. Once on the Interstate, Boham drove his vehicle around a truck to prevent Iske from outdistancing the truck. Boham forced Iske's vehicle to leave, at least partially, the traveled portion of the highway and put Iske "on the dirt temporarily." At the trial, there was sufficient evidence for a fact finder to conclude beyond a reasonable doubt that the motor vehicle maneuvers by Boham indicated a disregard for the safety of Iske. There was also sufficient evidence, not only from the defendant's conduct but also from his spoken words, for a fact finder to conclude beyond a reasonable doubt that Boham's disregard for Iske's safety was

intentional. Iske testified that Boham told him "if he'd seen me in a personal vehicle or on my motorcycle, that he would make sure I didn't go anywhere." The trial judge found that there was "terrible intent" on the part of Boham and that the testimony of the defendant and his witness was "preposterous." We note that there was no property damage to the vehicle Iske was driving, and he did not receive any injuries. However, for there to be willful reckless driving, it is not necessary for there to be property damage or injuries inflicted. *Goodloe v. Parratt*, 453 F. Supp. 1380 (D. Neb. 1978), *rev'd on other grounds* 605 F.2d 1041 (1979).

The trial court found beyond a reasonable doubt that the defendant was guilty of willful reckless driving. A finding of guilty by the trier of fact will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a guilty finding. See *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

It cannot be said as a matter of law that the evidence before the Douglas County Court was so lacking in probative force that the evidence was insufficient to support the trial court's finding that Boham was guilty of willful reckless driving.

The district court judgment is vacated, and that court is ordered to affirm the Douglas County Court's conviction of Boham and the sentence it imposed upon the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE T. ROBERTSON, APPELLANT, V. SOUTHWOOD, A PARTNERSHIP, ET AL., APPELLEES.

447 N.W.2d 616

Filed November 3, 1989. No. 87-898.

1. **Demurrer: Waiver.** Where there is no ruling on a demurrer in the record and there has been a trial on the merits, the demurrer will be considered waived.
2. **Receivers: Final Orders.** The appointment of a receiver may be treated as a final order. Neb. Rev. Stat. § 25-1090 (Reissue 1985).
3. **Partnerships: Accounting.** The rules for determining accounts among partners after dissolution are found in Neb. Rev. Stat. § 67-340 (Reissue 1986).

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Steve Windrum for appellant.

Donald W. Pederson and Michael E. Piccolo, of Murphy, Pederson, Piccolo & Pederson, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

GRANT, J.

This matter began by a petition filed by plaintiff-appellant, George T. Robertson, against Southwood partnership and 11 persons described as partners in Southwood. Plaintiff initially prayed for an accounting, along with other relief, but later amended his petition to seek a declaration that he was free from all liability to the partners or the partnership because plaintiff had terminated his interest in the partnership as of April 7, 1984. Six of the original twelve partners individually answered and counterclaimed for an accounting of sums due them by virtue of their payment of plaintiff's share of necessary capital contributions. These six parties were Sharon K. Bourne, Nola M. Moog, Charmaine T. LaFontaine, Wesley W. Grady, Mark H. Richardson, and David C. Cotton. They will be referred to herein as defendants-appellees. Four of the original partners withdrew from the partnership by mutual agreement and were not partners at any time relevant to this action.

The six defendants-appellees each cross-claimed against

Elden S. Wolfe, who had been one of the original partners, alleging that Wolfe, as well as plaintiff, had failed to pay his proportionate share of the partnership obligations. Plaintiff states that Wolfe was "similarly situated to plaintiff in his action throughout," but that Wolfe "settled and compromised his dispute with the partnership prior to trial . . . and is not now part of this action or appeal." Brief for appellant at 5. It is not shown how Wolfe disposed of his obligations to the partnership or to the individual partners, including plaintiff and defendants. Wolfe has apparently taken no position in the proceeding, but he has been specifically listed as a defendant throughout the case, up to and including plaintiff's notice of appeal. In determining the respective liabilities among the partners, the trial court correctly considered eight partners—the plaintiff, the six defendants-appellees, and Wolfe.

After pleadings and a subsequent trial, the trial court, on September 29, 1986, determined that the partnership had been dissolved but not terminated, and appointed a receiver to account for the liabilities among the partners and to wind up the partnership. All parties objected to the appointment of a receiver. On November 24, 1986, the trial court overruled all objections to the appointment. On March 16, 1987, the receiver filed a report.

On April 8, 1987, plaintiff filed a motion "to reflect amended petition on the record, to amend the petition." The written motion sought to delete plaintiff's prayer for an accounting and to add a prayer for a declaration that the plaintiff was free from liability to the defendants as partners. On April 20, 1987, the trial court granted the motion and permitted an amendment to the petition to be filed, "effective as of August 21, 1986," the date trial began. We note that plaintiff's filed motion does not accurately reflect plaintiff's oral motion made during the trial itself, because the oral motion did not seek to delete plaintiff's prayer for an accounting. Although plaintiff stresses his withdrawal of his request for an accounting, we do not see any controlling issue in that regard. The relief sought by plaintiff required a balancing of the liabilities among the partners in any event.

On June 23, 1987, the trial court entered an order overruling renewed objections to the appointment of the receiver and objections to the receiver's report. In that order, the court entered judgment against plaintiff and in favor of the partnership in the amount of $9,286.96, "terminated" the partnership, and set over "the assets and further liabilities of the partnership" to the six defendants-appellees and Wolfe. The order further provided that any party could object to the receiver's computation within 10 days. On July 2, 1987, plaintiff filed a motion for a new trial and an objection to the receiver's computations. Plaintiff's objections were apparently not ruled on, but on October 1, 1987, plaintiff's motion for new trial was overruled.

The plaintiff appeals and in his brief assigns eight errors to the actions of the trial court. The plaintiff's assignments of error, as summarized, allege that the trial court erred (1) in overruling the plaintiff's demurrer to each of the individual counterclaims for the reason that such counterclaims failed to state a cause of action, and several causes of action were misjoined; (2) in failing to declare plaintiff free from any liability with respect to the partners and the partnership; (3) in providing an accounting; (4) in appointing a receiver and in charging plaintiff for a proportionate share of the receiver's bill; (5) in finding the evidence sufficient to support judgment against plaintiff for $9,286.96; and (6) in entering judgment in favor of the partnership, which did not request affirmative relief.

For the reasons set out below, we reverse and remand the cause for further proceedings.

The facts in the record before us show the following. The Southwood partnership was formed in 1980 by a group of 12 real estate agents who worked together selling residential real estate for Gateway Realty of North Platte, Inc. The partnership agreement stated a general purpose of buying and selling real estate, without reference to any particular undertaking or term of existence. The partnership agreement also provided that each partner would contribute an equal share of additional capital to the partnership as needed for its operation. Before the signing of the partnership agreement, the partners determined

that the partnership would purchase a particular tract of land. The partners planned to subdivide the land and to earn commissions on the sale of the lots and on the sale of the homes that were built on the lots. The partners purchased an 8.87-acre parcel of land, consisting of two tracts. The first tract was 2.5 acres, which included a house and some other buildings. The second tract was 6.37 acres of unimproved real estate. The purchase agreement shows that the parcel was purchased for $96,000, to be paid in the following manner: $1,000 down; $6,500 at closing; assumption of mortgage to First Federal Savings and Loan Association of North Platte (now American Charter), with a balance of $18,800; payment of the land contract balance of $12,712.31; and a note to the sellers for the balance of approximately $57,000. The note to the sellers was to be paid in semiannual installments of $600 with a balloon payment on or before July 1, 1985.

The 12 initial partners each put up $900, and the partners and partnership made a note of approximately $14,000 to the North Platte State Bank to pay off the balance due at closing. The partnership's debt was serviced from rental income from the property, from additional equal capital contributions, or from additional borrowed funds. At times the property was rented for $550 per month. In May of 1986, the 2.5-acre tract was sold for an amount not in evidence. As part of this sale, the remaining 6.37 acres were rented to the buyers for a term of 3 years beginning May 2, 1986, at $75 per month. As part of the same transaction, the partnership loaned the buyers $2,597.61 and took a mortgage on a different property apparently owned by the buyers. The buyers also had an option to buy the additional leased land.

In a letter dated February 23, 1984, the attorney for the partnership informed the partners that North Platte State Bank was making demand for the payment of a June 24, 1983, note, in the principal amount of $31,360.86, due December 21, 1983, and that the partnership was unable to obtain alternative financing. The letter requested that each partner contribute $4,024.55 plus interest.

In response to this bank demand, each of the defendants-appellees paid the bank his or her respective share

plus interest. After these six payments, the bank note principal as of April 30, 1984, was reduced to $7,840.20. Plaintiff and Wolfe did not pay. Plaintiff's response to the request for payment of his share of the bank debt was a letter to the partners dated April 7, 1984. The letter set out in part:

> It is my decision at this date to terminate all of my partnership interests in the Southwood Partnership.
>
> It is with much regret and lots of serious thought that I am taking this action. Since I am no longer an active wage earner and because of my age, these two things have been the determining factor in my decision.

In December of 1984, under threat of foreclosure, defendants-appellees each paid a share of the April 30, 1984, balance on the note which resulted from plaintiff's and Wolfe's failure to pay. Each payment was $1,306.70, plus interest based on the date each partner paid the bank. As of December 17, 1984, the bank note was paid in full.

In the interim, the attorney for the partnership told the plaintiff that he could not get out of the partnership unless he went into competition with Gateway or died. The attorney's statement, although far from an accurate characterization of the plaintiff's right to sever his relationship with the partnership, was an apparent reference to paragraph 9 of the partnership agreement. Paragraph 9 provided, in part, that if a partner left Gateway and "remain[ed] active in the sale of real estate," the partnership was required to purchase and the partner was required to sell his or her partnership interest at a price based upon the partner's share of the adjusted cost basis of the partnership's real estate. In letters dated April 11, 1984, the plaintiff resigned from Gateway Realty and stated that he was now in competition with Gateway. The plaintiff transferred his real estate license to another real estate company and maintained listings there.

Receiving no response from the partners or partnership, the plaintiff's attorney, in letters dated May 8 and 11, 1984, made an offer of retirement to the partnership and sent the partnership a check in the amount of $728, which the plaintiff believed was the negative balance of his partnership account, based on a partnership statement at the end of 1983. The

partnership did not accept the check and did not respond to the offer of retirement.

In addition to the payment of the bank note as described above, defendants-appellees each contributed an additional $6,500 to the partnership over the period from July 1984 to May 1986. These contributions apparently retired the remaining debt of the partnership to third parties, other than the tax liens and other assessments on the partnership property. Those amounts had not been paid at the time of trial.

In the plaintiff's first summarized assignment of error, he contends that the trial court erred in failing to sustain his demurrer to the counterclaims. Plaintiff argues that on the morning of the trial, the trial court informally overruled his demurrer and that plaintiff then answered the counterclaims by stating on the record a denial of all the allegations in the counterclaims, other than the identities of the parties. Plaintiff, in his brief, contends that he preserved his demurrer. Plaintiff acknowledges that the trial court's ruling on the demurrer and plaintiff's answer to the counterclaims are not set out in the record before us.

As the court stated in *Buckingham v. Wray*, 219 Neb. 807, 809, 366 N.W.2d 753, 756 (1985):

> In the absence of extraordinary circumstances, an appellate court will not consider or review a ruling of a trial court when the questioned ruling is not a part of the trial record. We will not speculate about proceedings in a trial court but must rely upon the record presented for review. [Citation omitted.]

If the plaintiff believed that the bill of exceptions contained prejudicial errors, he had the responsibility and the opportunity to amend the bill of exceptions. See Neb. Ct. R. of Prac. 5E (rev. 1989). We stated in *Campbell v. City of Ogallala*, 183 Neb. 238, 240, 159 N.W.2d 574, 576 (1968), "[T]he record of the trial tribunal in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy shall be by appropriate proceeding to secure correction thereof in the trial court."

Where there is no ruling on a demurrer in the record and there has been a trial on the merits, the demurrer will be

considered waived. *State ex rel. League of Municipalities v. Loup River P. P. Dist.*, 158 Neb. 160, 62 N.W.2d 682 (1954). Plaintiff's first assignment of error is without merit.

With reference to the second summarized assignment of error, the plaintiff contends the court erred in failing to adjudge plaintiff free of all liability to defendants-appellees and to the partnership. This assignment has no merit.

The plaintiff did not present the trial court with any possible basis for finding him free of liability to the partnership or to the individual partners upon final settlement. Under Neb. Rev. Stat. § 67-315(b) (Reissue 1986), the plaintiff was jointly liable for the debts of the partnership in this case. Absent any agreement among the partners and partnership creditors of the types specified in Neb. Rev. Stat. § 67-336 (Reissue 1986), the plaintiff's liability was unaffected by the dissolution. There was no such agreement in this case. The evidence at trial indicated that the partnership was insolvent and that the plaintiff will be liable for contribution upon final settlement. The plaintiff's assignment of error in this regard is without merit.

With further regard to plaintiff's second summarized assignment of error, it appears that plaintiff contends the trial court erred in not finding that plaintiff terminated his interest under paragraph 9 of the partnership agreement. Paragraph 9 provides generally for the purchase of the interest of a partner by the remaining partners in the event of death or severance of employment with Gateway. It provided two potential methods of termination of a partner's interest upon severance from Gateway. Paragraph 9(a) provided, in part, that in the event a partner ceased "to actually sell real estate in Lincoln County, Nebraska, said partner may offer to sell said real estate back to the partnership," using the provisions of the agreement applicable in the event of death to determine the value of such interest and provide for settlement of such interest. The record before us does not contain any evidence that plaintiff offered to sell the real estate back to the partnership under the formula referred to in paragraph 9(a).

We also find that plaintiff did not terminate his interest under paragraph 9(b) of the agreement, which provides that the partnership must purchase a partner's partnership property

"[i]n the event the terminating partner shall remain in Lincoln County, Nebraska, and remain active in the sale of real estate . . . ." The trial court found generally that plaintiff's actions did not trigger any specific form of termination under the partnership agreement, but that plaintiff's actions dissolved the partnership under the Uniform Partnership Act. We agree with those findings and, in our de novo review, find that the plaintiff did not remain active in the sale of real estate as contemplated in the partnership agreement, and thus plaintiff did not satisfy the conditions of paragraph 9(b) of the agreement. The trial court was correct in not applying paragraph 9(a) or 9(b) to any purported termination by plaintiff. Plaintiff's contentions to the contrary in this regard are without merit.

The third summarized assignment of error is directed at the propriety of the accounting in the trial court. Plaintiff's apparent contention is that the trial court should not have provided an accounting because the plaintiff had deleted his prayer for an accounting and the defendants-appellees' counterclaims were impermissible actions at law and not requests for an accounting. Even if plaintiff's late amendment was proper, it did not change the nature of his action. After the amendment the petition still requested relief which required an accounting of liabilities among the parties.

With respect to defendants-appellees' counterclaims, actions at law between partners are generally not allowed, in order to avoid piecemeal litigation. In *Younglove v. Liebhardt*, 13 Neb. 557, 14 N.W. 526 (1882), we held an action by a partner against a partner for work and labor performed for the partnership could not be maintained. However, in reversing the judgment in favor of the plaintiff partner in the *Younglove* case, we remanded the cause with leave to the plaintiff "to amend his petition and ask for an accounting." *Id.* at 558, 14 N.W. at 527.

In this case, the counterclaims were in conjunction with plaintiff's petition, which indicated that the partnership was dissolved and which initially requested an accounting. All parties requested relief in the nature of an accounting and such relief as the court deemed equitable. The following circumstances support the trial court's decision to provide for an accounting and to order the winding up of the partnership:

(1) The partnership was dissolved by the plaintiff's letter of termination; (2) prior to dissolution, the plaintiff failed to meet his obligation under the partnership agreement to contribute capital on an equal basis as needed for the operation of the partnership; (3) the defendant partners contributed capital beyond the amount required under the partnership agreement to prevent foreclosure on partnership assets; (4) there was evidence that the partnership was insolvent; (5) defendants-appellees refused to acknowledge dissolution and failed to account to the plaintiff; and (6) the partnership agreement did not provide otherwise. The accounting and final winding up were necessary to provide both the plaintiff and the defendants-appellees the relief they sought. The trial court did not err in providing an accounting and ordering the winding up of the partnership. Plaintiff's third assignment of error is without merit.

Plaintiff's fourth summarized assignment of error concerns the receiver appointed by the trial court. The appointment of a receiver may be treated as a final order. Neb. Rev. Stat. § 25-1090 (Reissue 1985). The plaintiff chose not to appeal within 30 days after the receiver was appointed. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1988). Since the cause must be remanded in any event, the plaintiff's assignment of error in this regard will not be addressed. The costs of the receiver will be shared equally by each of the eight partners remaining at the time of trial. Whether a receiver may be appointed on remand remains an issue to be determined at that time.

The fifth summarized assignment of error relates to the trial court's finding, based upon the receiver's report, that the plaintiff is indebted to the partnership in the amount of $9,286.96. It may well be that the court's order achieved rough justice among the parties to this lawsuit, but on presentation of the precise issue it becomes apparent that the accounting was not properly done and the amount of the judgment was not properly calculated according to statutory principles. We agree with the plaintiff that the judgment of the trial court is not supported by the evidence.

The receiver's report stated that the assets of the partnership included a checking account with a balance of $1,614.02 as of

March 13, 1987; a promissory note to the partnership with a principal balance of $1,506.36 as of March 16, 1987 (with $50 due per month); and 6.37 acres of real estate subject to a 3-year lease that began on May 2, 1986, with rent of $75 per month and subject to an option. The real property is subject to an unspecified amount of taxes and assessments. The receiver's report contained an unsubstantiated statement that the value of the real estate "may not [sic] be exceeded by the taxes and assessments against it."

The receiver's report also stated that the sole remaining liability of the partnership, apparently other than unpaid taxes and assessments against partnership property, was a debt of $253.55 owed to a former partner, to be paid in installments of $6.23 each month.

The receiver's report went on to find that the six defendants-appellees had contributed a total of $74,295.67 to the partnership between December 1983 and May 1986, the time period during which the plaintiff refused to contribute. The receiver divided that amount by 8, the number of partners in the partnership during that period, to determine the plaintiff's share of $9,286.96.

The rules for determining accounts among partners after dissolution are found in Neb. Rev. Stat. § 67-340 (Reissue 1986). The receiver's report in this case failed to account for the assets of the partnership as required by § 67-340(a)(I) and (c). The plaintiff was entitled under § 67-340(c) to have the assets of the partnership applied against the liabilities of the partnership before calculating his share of additional contribution. In determining plaintiff's contribution, the trial court failed to account for the $1,614.02 in the checking account; a note owing to the partnership for the amount of $1,506.36; and the value, if any, of the 6.37 acres of real estate owned by the partnership. Such matters must be corrected on a proper windup of the partnership.

Although the plaintiff did not argue any issue in this respect, the accounting approved by the trial court also failed to consider the nature and propriety of partnership expenditures subsequent to the dissolution and whether contributions by the partners were loans to the partnership, bearing interest under

Neb. Rev. Stat. § 67-318(c) (Reissue 1986), or whether the contributions were capital in nature. Loans by the partners to the partnership are accounted for under § 67-340(b)(II), and capital contributions are accounted for under § 67-340(b)(III). The fifth assignment of error has merit and is a further basis for remand as stated above.

In connection with the plaintiff's sixth summarized assignment of error, any judgment based upon the accounting should be in favor of the defendants-appellees on their counterclaims and not in favor of the partnership. In remanding the cause, we note that this partnership was dissolved April 7, 1984, and its affairs have not been properly wound up and the partnership has not been properly terminated. The cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROSE MARIE REIFSCHNEIDER, APPELLANT AND CROSS-APPELLEE, V. NEBRASKA METHODIST HOSPITAL, APPELLEE AND CROSS-APPELLANT.

447 N.W.2d 622

Filed November 3, 1989. No. 87-1069.

1. **Estoppel: Fraud: Limitations of Actions.** The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may by his representations, promises, or conduct be so estopped, where the other elements of estoppel are present.
2. **Estoppel.** Equitable estoppels rest largely on the facts and circumstances of the particular case.
3. **Limitations of Actions: Estoppel.** Generally, if a plaintiff has ample time to institute an action after the inducement of delay has ceased to operate, he or she cannot excuse the failure to act within the statutory time on the ground of estoppel.
4. **Estoppel.** The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are

> otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Michael G. Goodman, of Matthews & Cannon, P.C., for appellant.

Robert M. Slovek, of Sodoro, Daly & Sodoro, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The plaintiff, Rose Marie Reifschneider, commenced this action on May 1, 1980, to recover damages for the injuries she sustained on April 4, 1977, which she alleged were caused by the negligence of the defendant, Nebraska Methodist Hospital (Methodist). In *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986), this court reversed the order of the district court sustaining Methodist's motion for summary judgment and remanded the cause for further proceedings.

The plaintiff's third amended petition, filed April 7, 1987, alleged that she had been injured on April 4, 1977, as the result of the malpractice and negligence of Methodist's employees; that in order to induce plaintiff to forgo filing suit for malpractice and negligence, Methodist's agent agreed to pay all of the expenses which plaintiff might incur as a result of the April 4 accident; that plaintiff relied on this promise and "forewent the filing of such suit"; that Methodist paid all expenses from April 1977 through July 1978, but referred plaintiff to Methodist's insurance carrier at that time; that during subsequent settlement negotiations with Methodist and its insurer, plaintiff's father was assured that plaintiff's medical

bills would be paid as agreed; that because of the conduct of Methodist and its agents, plaintiff and her father "were lulled into a sense of security and belief that plaintiff's expenses would always be taken care of, and that it was appropriate for her, therefore, to trust the defendant and forego the filing of suit for malpractice as she had agreed"; and that "defendant's failure to comply with its promise after the defendant had changed its position to her detriment estops it from claiming the running of the statute of limitations in this case."

In its answer, Methodist affirmatively alleged the statute of limitations as a defense and disputed the facts of any estoppel claimed by the plaintiff. Methodist also affirmatively alleged that neither it nor its agents were negligent.

On the defendant's motion, the trial was bifurcated pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1985) to determine the issues related to Methodist's statute of limitations affirmative defense. Apparently, the parties are in agreement that the applicable statute of limitations is Neb. Rev. Stat. § 44-2828 (Reissue 1988), which provides that any action to recover damages based on malpractice or professional negligence shall be commenced within 2 years next after the act or omission providing the basis for such action.

The plaintiff's request for a jury trial on the statute of limitations issue was denied. After a trial to the court without a jury, the court found the statute of limitations ran on April 4, 1979, and dismissed the plaintiff's third amended petition. The plaintiff has appealed, contending the court erred in finding she was not entitled to a jury trial on the statute of limitations issue. Methodist has cross-appealed, claiming the district court erred in failing to sustain its motion for a directed verdict.

The record shows that the plaintiff was injured when she fell from an unattended hospital cart in the emergency room at Methodist on April 4, 1977. The plaintiff's father, Jacob Reifschneider, was a member of the hospital board of trustees on the date in question and acted as plaintiff's agent throughout the attempted resolution of the matter. Jacob Reifschneider was also a trustee for the Eppley Foundation, which had provided grants to Methodist.

The plaintiff concluded that Methodist was responsible for

her injuries and considered filing suit against Methodist as early as April 1977. On April 8, Jacob Reifschneider contacted an attorney who, in turn, referred him to attorney Richard Fellman, who agreed to handle the case. Fellman's letter of April 15, 1977, to John Estabrook, the president of Methodist, made claim for the plaintiff's injuries and damages and advised Estabrook that he had instructions to proceed, if necessary, with litigation.

Jacob Reifschneider met with Estabrook on April 16, 1977. During this meeting Jacob Reifschneider and Estabrook agreed that Methodist would pay the plaintiff's medical expenses arising from the April 4 accident. Estabrook testified that he agreed to pay the expenses for a short period of time and advised Jacob Reifschneider to file a claim with Methodist's insurance company. Although there was no dollar limit on the agreement, Estabrook testified that he and Reifschneider believed the matter would be cleared up within 6 months. Jacob Reifschneider testified by deposition that there was no time limit on the agreement. Jacob Reifschneider and Estabrook did agree during the April 16 meeting that a lawsuit against Methodist would not be filed if Methodist would pay the plaintiff's medical expenses. Fellman was discharged on April 18, 1977.

Pursuant to the agreement, Methodist absorbed its own costs for the plaintiff's treatment and paid the plaintiff's doctor bills. Methodist also paid all expenses associated with four trips which the plaintiff made to the Mayo Clinic in July, August, and October 1977, and May 1978.

In July 1978, Methodist stopped paying the doctor bills and began billing the plaintiff directly for her hospital expenses. Estabrook testified that in July 1978 he advised Reifschneider to contact Methodist's insurance agent, Harry Koch, and file a claim with Methodist's insurance company.

On September 20, 1978, the plaintiff and her father met with Dennis Donner, a claims representative for The St. Paul Fire and Marine Insurance Company (St. Paul), Methodist's insurer, to discuss the merits of the plaintiff's claim and the statute of limitations issue. Donner investigated the claim and on September 28, 1978, wrote a memorandum to the plaintiff

advising her that the statute of limitations was 2 years under the Nebraska Hospital-Medical Liability Act. The plaintiff was represented by attorney Ray Simon on this date.

During the fall of 1978, the plaintiff, her father, and attorneys Ray Simon and John Miller met to discuss investigating a malpractice claim against Methodist. The plaintiff testified that she retained Miller in October 1978. On October 27, 1978, the plaintiff signed an authorization for Simon and Miller to examine her medical records. The purpose of the authorization was to assist her attorneys in preparing a case against Methodist "if . . . need be." The plaintiff testified that at the time she hired Miller, she personally believed that Methodist would not settle the claim and that she probably would have to sue Methodist to get satisfaction.

Jacob Reifschneider continued to negotiate with St. Paul's agent Koch and Estabrook regarding settlement of the claim. He met with Koch and Estabrook on January 31, 1979, to discuss a $250,000 settlement. Jacob Reifschneider's notes of this meeting indicate that Simon urged the plaintiff to proceed with litigation. Jacob Reifschneider, however, did not want to litigate.

On February 28, 1979, Donner wrote a letter to the plaintiff stating, "It is our conclusion that there is no liability on the part of [Methodist] and I will be unable to offer settlement." Donner was willing to offer $5,000 to close St. Paul's file and avoid litigation. The plaintiff testified she understood Donner's letter to mean that St. Paul would not settle and that St. Paul was Methodist's insurance carrier. She was represented by Miller on this date.

Notwithstanding St. Paul's denial of liability, settlement negotiations continued because of Reifschneider's longstanding relationship with Methodist and his position with the Eppley Foundation. Koch advised Jacob Reifschneider on March 5, 1979, that St. Paul would not settle, but on March 28, Koch proposed that St. Paul and Methodist establish a $25,000 escrow fund to pay the plaintiff's expenses for a 10-year period. Koch testified, however, that he never recommended to plaintiff that she should not file suit.

Even though no lawsuit had been filed by April 4, 1979,

Koch and Estabrook continued to discuss settlement options with Jacob Reifschneider. On April 28, 1979, Jacob Reifschneider declined the $25,000 settlement offer. Apparently, the offer remained open, but on June 20, 1979, plaintiff herself returned a $12,500 check to Estabrook and demanded $250,000. As of August 8, 1979, the $25,000 offer still remained open. Present counsel were retained in August 1979. This action was filed on May 1, 1980.

The sole issue on the appeal is whether equitable estoppel, or estoppel in pais, applies in this case.

"[T]he equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations and a defendant may, by his representations, promises, or conduct be so estopped where the other elements of estoppel are present." *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 346, 175 N.W.2d 621, 623-24 (1970); *Luther v. Sohl*, 186 Neb. 119, 181 N.W.2d 268 (1970). Equitable estoppels rest largely on the facts and circumstances of the particular case. *Luther v. Sohl, supra*; *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). Generally, if a plaintiff has ample time to institute an action after the inducement of delay has ceased to operate, he or she cannot excuse the failure to act within the statutory time on the ground of estoppel. *Luther v. Sohl, supra*; *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 348 N.W.2d 869 (1984); *Seagren v. Peterson*, 225 Neb. 747, 407 N.W.2d 790 (1987).

In *Luther v. Sohl, supra*, the plaintiff was injured on December 14, 1964, while assisting the defendant in repairing a roof. Both the plaintiff and defendant were insured by Farm Bureau Insurance Company. Plaintiff was aware on the date of his injury that the statute of limitations was 4 years and that it would run on December 14, 1968. In January 1967, the plaintiff contacted Farm Bureau in an attempt to settle his claim. A Farm Bureau agent visited the plaintiff at his home on November 1, 1967, to obtain medical releases. On June 13, 1968, the plaintiff expressed concern to the Farm Bureau agent about the statute of limitations. The agent told the plaintiff that as long as they were still negotiating he need not worry. The agent then made a specific settlement offer which was refused.

On July 10, 1968, the Farm Bureau agent reiterated the offer of June 13 and advised the plaintiff and his wife that it was the final amount the company would offer. Plaintiff again refused the offer, and the agent stated that he would attempt to get more. On July 18, 1968, the agent notified the plaintiff that Farm Bureau would not offer a higher settlement. The plaintiff had no further negotiations with Farm Bureau after July 18, 1968. Both the plaintiff and his wife testified that they believed Farm Bureau ceased negotiating in July 1968. Under these circumstances, we held that the defendant was not estopped from raising the statute of limitations as a defense in the plaintiff's action for personal injuries.

> [T]he evidence is clear that the only possible inducement for delay was a representation that as long as they were negotiating the plaintiff need not worry about the statute of limitations. That representation was made June 13, 1968. It is also clear that the last negotiations were on July 18, 1968, and plaintiff at that time "supposed" the insurance company had ceased negotiating. Almost 5 months went by after that before the bar of the statute finally fell.

Id. at 122, 181 N.W.2d at 270.

In *Seagren v. Peterson, supra*, the plaintiff was damaged because of the defendant attorney's failure to file an estate tax return on May 1, 1980. The default was not discovered until June 1983, and the plaintiff had until June 1984 to file an action, pursuant to Neb. Rev. Stat. § 25-222 (Reissue 1985). The lawsuit was not filed until January 28, 1985, and the defendant's motion for summary judgment was sustained because the action was barred by the statute of limitations. On appeal, the plaintiff claimed that his failure to comply with the statute of limitations should be excused on the ground of estoppel because the defendant assured him several times that he would take care of any interest and penalties resulting from the failure to file the tax return. This court determined that estoppel did not apply to the facts of the case:

> [I]t became quite apparent by the time [defendant] withdrew from the case in June of 1983 and plaintiff had engaged other counsel that [defendant] was not going to

> make good on his promise. Seven more months went by before the estate tax return was filed, in the latter part of January 1984, and the amount of tax was determined and presumably paid. Plaintiff therefore had approximately an additional 5 months within which to file his action under the 1-year extended limitation.

225 Neb. at 750, 407 N.W.2d at 792-93.

The plaintiff relies on *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 175 N.W.2d 621 (1970), in which we held that the defendant was estopped from raising the statute of limitations as a defense to the plaintiff's personal injury claim. In that case, State Farm's insured, Sam Garafalo, was involved in an automobile accident with defendant William Budd on December 26, 1961. State Farm paid Garafalo the amount of the damages to his automobile and was subrogated to his claim against Budd in the sum of $1,650. Budd was insured by Aetna Casualty & Surety Company.

State Farm notified Aetna of its subrogation claim. On March 31, 1962, Aetna replied that the subrogation claim would be considered upon conclusion of the personal injury claim arising out of the accident. On 14 separate occasions between April 16, 1962, and October 21, 1965, Aetna informed State Farm that its file was still open and that it would consider the subrogation claim after the bodily injury claim was settled. On February 8, 1966, Aetna notified State Farm that the statute of limitations had run and rejected the subrogation claim.

Under those circumstances, the court stated:

> "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought." [Citations omitted.]
>
> In the present case, defendant's insurer on three occasions assured plaintiff it would "honor" plaintiff's claim and concedes it was liable for the full amount of the claim. Having convinced plaintiff that its claim would be honored or paid, it was not difficult to secure multiple extensions of time until the statute of limitations had run

> against the claim. In reliance on Aetna's assurances, plaintiff forbore suit. Now defendant seeks to take advantage of his insurer's trickery and dishonesty to defeat plaintiff's just claim. To permit him to do so would be contrary to equity, morality, justice, and good conscience. We find that defendant should be held to the position previously assumed by his insurer and should be required to "honor" plaintiff's claim.

Id. at 347-48, 175 N.W.2d at 624.

In the present case, it is uncontroverted that the plaintiff did not file suit until more than 3 years after she was injured. The plaintiff does not claim that the 2-year statute of limitations set forth in § 44-2828 is inapplicable to her claim or that her cause of action falls within the discovery exception to that statute. The only issue with respect to the statute of limitations is whether the defendant was estopped from pleading the statute of limitations because of its alleged representations to the plaintiff. On this issue, the plaintiff alleged that she and her father "were lulled into a sense of security and belief that plaintiff's expenses would always be taken care of" during settlement negotiations with the defendant.

The elements of equitable estoppel are,

> as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. [Citations omitted.]

Jennings v. Dunning, 232 Neb. 366, 371, 440 N.W.2d 671, 675 (1989). See, also, *Sevier v. School Dist. HC 1, ante* p. 293, 444

N.W.2d 897 (1989).

The plaintiff testified that she believed that the defendant was responsible for her injuries dating from April 1977. She considered filing suit in April 1977, but agreed not to do so based on Methodist's promise that it would pay her medical expenses associated with the April 4, 1977, accident. In July 1978, however, her father was notified that Methodist would no longer pay these expenses and was advised to file an insurance claim. Methodist made no payments after July 1978. In September 1978, Methodist's insurer advised plaintiff that the statute of limitations on the claim was 2 years. In October 1978, approximately 6 months before the statute of limitations ran, the plaintiff determined that she would sue Methodist if she did not get satisfaction and believed that she would not get a satisfactory settlement from Methodist unless she filed suit. Plaintiff was represented by counsel when she was informed by the insurance company that the statute of limitations was 2 years, and when her insurance claim was denied on February 28, 1979.

The plaintiff herself testified that she was not induced to forgo filing suit by Methodist's alleged agreement to pay her medical bills:

> Q. Did any representative of the hospital or the insurance company tell you that in exchange for your cooperation that a settlement would be guaranteed for you?
>
> A. No.
>
> Q. Did they even tell you that it was possible, likely?
>
> A. No. They were just reviewing for the hospital.
>
> Q. So as you understood it there were no guarantees of settlement?
>
> A. There was never any guarantee to my knowledge or stated to me.

The facts that the plaintiff knew of the applicable statute of limitations, was represented by attorneys prior to the statute's running, and believed that she would not receive satisfaction on her claim short of litigation, all were uncontroverted at trial. In order to prevail, the plaintiff was required to demonstrate reliance, in good faith, upon conduct or statements of the

defendant or its agents. The record shows as a matter of law that there were no statements or conduct such as was alleged by the plaintiff or reliance on such by the plaintiff. The evidence was insufficient to create a question of fact on the issue of estoppel.

In the absence of a fact question, we need not decide whether the trial court erred in failing to grant the plaintiff's request for a jury trial. It is unnecessary to consider the cross-appeal.

The judgment of the district court is affirmed.

AFFIRMED.

PATRICIA J. WICKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JACK CALVIN WICKER, DECEASED, APPELLANT, V. CITY OF ORD, A NEBRASKA POLITICAL SUBDIVISION, ET AL., APPELLEES.

447 N.W.2d 628

Filed November 3, 1989. No. 88-105.

1. **Actions: Torts: Negligence: Principal and Agent: Liability: Releases.** The valid release of an agent in a tort action based exclusively on the alleged negligence of that agent also releases the principal from liability, even though the release specifically reserves all claims against the principal.
2. **Principal and Agent: Liability: Immunity.** The immunity Neb. Rev. Stat. § 71-5111 (Reissue 1986) grants to certified ambulance attendants shields their principals from liability to the same extent as it shields the agent-attendants.
3. **Summary Judgment.** Summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing an order granting a summary judgment, the Nebraska Supreme Court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence.
5. **Negligence: Intent: Proof: Words and Phrases.** In order for an action to be willful or wanton, the evidence must prove that a defendant had actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent harm which was reasonably likely to result.

6. **Negligence: Intent: Words and Phrases.** To constitute willful negligence, the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith.
7. _____: _____: _____. Wanton negligence is the doing of or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.
8. **Negligence: Words and Phrases.** Gross negligence means great and excessive negligence, that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
9. **Negligence.** Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed.

Peter B. Beekman, of Weaver, Beekman & Merz, for appellant.

John R. Brownell, of Lauritsen, Baker, Brownell & Brostrom, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiff-appellant, Patricia J. Wicker, individually and as the personal representative of the estate of her deceased husband, Jack Calvin Wicker, sued the defendants-appellees, City of Ord, Nebraska, and Rural Fire Protection District #2 of Valley County, Nebraska, under the provisions of the Political Subdivisions Tort Claims Act for her husband's loss of his chance for survival. Plaintiff appeals from the trial court's sustainment of defendants' joint motion for summary judgment, assigning six errors, which merge to claim that the court below erroneously (1) determined that Neb. Rev. Stat. § 71-5111 (Reissue 1986) shields defendants from liability; (2) found that defendants' personnel did not act in a willful, wanton, or grossly negligent manner; and (3) failed to find, as a matter of law, that defendants' personnel did act in a willful, wanton, or grossly negligent manner. We affirm.

Before reviewing the facts, it is appropriate that we set forth the language of § 71-5111:

> No certified ambulance attendant who provides public emergency care or rescue service shall be liable in any civil action to respond in damages as a result of his acts of commission or omission arising out of and in the course of his rendering in good faith any such service. Nothing in this section shall be deemed to grant any such immunity for liability arising out of the operation of any motor vehicle in connection with such service, nor shall immunity apply to any person causing damage or injury by his willful, wanton, or grossly negligent act of commission or omission.

For purposes of the foregoing section, Neb. Rev. Stat. § 71-5102(2) (Reissue 1986) defines "ambulance attendant" as one "trained or qualified to provide for, or any other individual who provides for, the care of patients while such patients are being transported in an ambulance."

The record establishes that the city contracted to provide emergency rescue services to the aforenamed fire protection district through the city's volunteer fire department, known as Ord 99. Plaintiff pled, and defendants admitted, that Ord 99 acted throughout the event we are about to describe as the agent of the city. The deposition testimony and other exhibits received in evidence fail to establish that the rural fire protection district was negligent in entering into the contract with the city or that the district did anything other than receive the services for which it contracted. Thus, the record fails to establish any basis for imposing liability on the fire protection district, see *Dabelstein v. City of Omaha*, 132 Neb. 710, 273 N.W. 43 (1937), and, thus, the judgment of the trial court as to that defendant must be, and is hereby, affirmed.

The remainder of this opinion concerns itself with the issues plaintiff's summarized assignments of error raise with respect to the City of Ord. In that regard, the record shows that the decedent was working as a concrete form carpenter at a construction site in rural Valley County, apparently within the jurisdiction of the fire protection district, when, at approximately 4 p.m., he collapsed from an unknown cause. After falling to the ground, the stricken victim began convulsing, vomited, and apparently voided himself. As his

coworkers gathered around him, one of them, Steve Anderson, began to administer cardiopulmonary resuscitation and was later joined by Joseph Ambrose. While those two continued resuscitation efforts, a foreman at the construction site summoned an ambulance to the scene.

The Ord Police Department dispatcher's log shows that the alarm summoning volunteer rescue workers from Ord 99 was sounded at 4:20 p.m. It was necessary for the ambulance to travel over rough terrain in order to reach the construction site, which was located approximately 10.5 miles from Ord, and, as a result, the Ord 99 rescue workers arrived at the scene approximately 20 to 25 minutes after the alarm was sounded. The record further shows that a total of 14 volunteers responded to the alarm, 8 of whom were volunteer emergency medical technicians who had received only the most basic level of training.

When the rescue workers arrived, they found members of the construction crew gathered around the stricken victim, with one crewmember, Anderson, administering resuscitation. Frank Smedra was apparently the first volunteer to reach the victim. Smedra asked Anderson to discontinue resuscitation efforts so that he (Smedra) could check the stricken victim's vital signs. After Smedra and at least one other volunteer had examined the victim, the volunteers concluded that death had occurred, and did not resume resuscitation efforts. A deputy sheriff was then called to the scene to pronounce the victim dead, after which decedent was transported to a mortuary.

The record includes evidence that the volunteers acted improperly by failing to continue or resume resuscitation efforts upon the stricken victim. According to applicable standards promulgated by the American Heart Association and the American Medical Association, such efforts should have been resumed immediately after Smedra had checked the vital signs, and the decedent should have been transported to a hospital, with resuscitation efforts continued during transportation.

The deposition of Stephen W. Carveth, M.D., a cardiovascular and thoracic surgeon, provides evidence that a stricken person's chance of survival is "up to . . . 50 percent" if

cardiopulmonary resuscitation is administered within 3 minutes. However, the deposition of Dale L. Kemmerer, M.D., provides evidence that decedent's chance of survival may have been considerably less than 50 percent even if such efforts had been continued in this case.

Eight of the responding volunteers, including Smedra and Wayne D. Brown, the two deposed by plaintiff, had received their initial emergency medical technician training, consisting of approximately 82 hours of instruction, 12 to 14 years prior to the subject incident. Both Brown and Smedra have had some limited additional followup training.

When deposed, Smedra was asked if he recalled the procedure for terminating resuscitation efforts after they had been initiated. He replied, "It would be — one-man would be until somebody qualified who would come up and take over or if somebody would take over for you or a physician to take over for you, or if you would just be exhausted to the point that you couldn't." The record does not indicate whether Smedra was aware of or remembered the proper guidelines for terminating resuscitation efforts at the time he went to decedent's aid.

In giving his deposition, Brown indicated that Ord 99 had no procedure for discontinuing resuscitation efforts after they had been initiated. Brown did not recall what had been taught in his emergency medical technician training course with respect to the proper termination of such efforts.

In view of the errors assigned and the resolution we reach, we assume, as the trial court apparently did, but do not decide, that plaintiff has pled a theory on which she might, under appropriate circumstances, recover under our law.

We begin our analysis of the question presented by the first summarized assignment of error, whether the immunity § 71-5111 grants to certified ambulance attendants also applies to their principals, by reviewing *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959). In that case a young child was injured when struck by an automobile. He named his father and his father's employer as defendants in the case on the theory that the father's negligence was within the scope of his employment and caused the accident. The petition was dismissed as to the father on the ground that an unemancipated minor could not

sue for the negligent tort of a parent. In affirming the summary judgment entered in favor of the father's employer, this court stated:

> It should be remembered that [the employer's] liability, if any, is not that of a joint tort feasor but derivative solely from the liability of [the father], if any. . . .
>
> . . . .
>
> In Emerson v. Western Seed & Irr. Co., [116 Neb. 180, 216 N.W. 297 (1927)], we held a married woman could not sue her husband to recover damages for injuries to her person and consequently she could not sue her husband's employer for damages caused by the husband's negligence, stating as the reason for so holding that: "It would seem that to permit a recovery against the employer results simply in countenancing an encircling movement where a frontal attack upon the husband is inhibited." . . . " 'The primary liability to answer for such an act, therefore, rests, upon the employee, and when the employer is compelled to answer in damages therefor he can recover over against the employee.' " . . .
>
> . . . .
>
> Having come to the conclusion that even if [the father] could be said to be guilty of the specific charges of negligence made against him, a question which we assumed in favor of appellant but factually did not decide, such guilt would not support a verdict in favor of appellant against [the employer] because, as we said, appellant could not maintain an action therefor against [the father].

169 Neb. at 224-26, 99 N.W.2d at 25-26.

While the law concerning interspousal immunity has changed, *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979), our attention has been called to nothing, nor did our independent research efforts reveal anything, which suggests that the law of agency applied in *Pullen* has changed.

It is also a well-established rule in this state that " '[i]n a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or prinicpal [sic] from liability, even

though the release specifically reserves all claims against the employer-principal.' " *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 354, 436 N.W.2d 184, 188 (1989), quoting *Dickey v. Meier*, 188 Neb. 420, 197 N.W.2d 385 (1972). *Mallette v. Taylor & Martin, Inc.*, 225 Neb. 385, 406 N.W.2d 107 (1987), and *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982), are in accord.

Moreover, when a public employee has been found to be immune from liability, this court has generally held that such immunity extends to the political subdivision. For example, in *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984), a county health officer's discretionary immunity also immunized the county from liability. And in *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977), a sheriff's quasi-judicial immunity for ministerial acts also immunized the county from liability.

Applying the foregoing principles of agency to the question at hand, we conclude that the immunity § 71-5111 grants to the attendants who responded to the call in this case shields Ord 99 as their principal from liability to the same extent as it shields the agent-attendants.

That determination makes it necessary that we address the remaining two summarized assignments of error, which concern the degree of the negligence proved. As they are the converse of each other, they will be treated together.

In undertaking that analysis, it is well to begin by reminding ourselves that summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law. Moreover, in reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence. *Nichols v. Ach, ante* p. 634, 447 N.W.2d 220 (1989); *Graphic Resources, Inc. v. Thiebauth, ante* p. 592, 447 N.W.2d 28 (1989); *Bank of Burwell v. Kelley, ante* p. 396, 445 N.W.2d

871 (1989); *First Security Sav. v. Aetna Cas. & Surety Co., ante* p. 335, 445 N.W.2d 596 (1989); *State Farm Fire & Cas. Co. v. Victor,* 232 Neb. 942, 442 N.W.2d 880 (1989).

Since the immunity granted by § 71-5111 does not extend to willful, wanton, or gross negligence, the question we must ask is whether it can be said as a matter of law that the city's personnel were not so negligent.

Addressing first the standard applicable to willful or wanton conduct, we look to *Guenther v. Allgire*, 228 Neb. 425, 428-29, 422 N.W.2d 782, 785 (1988), in which this court stated:

> In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequences. *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987).
>
> To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury. *Id.*, quoting from *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

(Emphasis in original.)

In *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987), cited in *Guenther, supra*, suit was brought against Omaha Public Power District for injuries a boy sustained while sledding on property owned by the district and made available to the public for recreational purposes. Consequently, the land was subject to the Recreation Liability Act; therefore, the district could be held liable only for willful or malicious failure to guard or warn against a dangerous condition on the land. The accident occurred when the boy's sled struck a metal object which was embedded in the snow. The suit alleged that the district's failure to warn of the dangerous

condition of the lot donated for recreational purposes constituted a willful and malicious act on the part of the district. In resolving the issue, this court stated:

> We have further examined the record in its entirety and find no evidence to support a claim that the District had *actual knowledge* that a danger existed, and, therefore, the District could not be found to have willfully or maliciously failed to guard or warn against such dangerous condition or structure as required by § 37-1005....
>
> ....
>
> In view of the fact that the evidence fails to disclose that the defendant willfully or maliciously failed to guard or warn against the dangerous conditions or structure, the District was relieved of liability as a matter of law.

(Emphasis supplied.) *Gallagher, supra* at 359, 405 N.W.2d at 575.

While plaintiff argues that the volunteer attendants intentionally discontinued efforts to revive the victim through cardiopulmonary resuscitation and that they knew that proper procedures required them to continue resuscitation efforts and transport the victim to a hospital, it nonetheless cannot be said that the volunteers acted in a willful or wanton manner. First, while Smedra apparently knew the proper termination procedures at the time he was deposed, nothing in the record indicates that he remembered them at the time he went to the victim's aid. Even if Smedra or any of the other attendants responding to the call did remember that according to recognized standards resuscitation efforts should have been continued, the danger which was to be avoided here, according to plaintiff's theory, was the possibility that the victim would lose his chance of survival, and not the danger that recognized procedures for termination of resuscitation efforts would not be followed. Because the attendants were convinced that the victim was dead, they had no knowledge of the danger that the discontinuance of resuscitation efforts could result in the loss of the victim's chance of survival. Because the attendants were not aware of that danger, they did not have the requisite actual knowledge required under *Gallagher* to enable them to

extinguish the victim's chance of survival through a willful or wanton act.

The next question, then, is whether the attendants acted in a manner which was grossly negligent. *Jones v. Foutch*, 203 Neb. 246, 252, 278 N.W.2d 572, 576 (1979), provides the standard for determining the existence of such negligence: " ' "Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty." ' "

> "[W]hether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. [Citation omitted.] In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury."

Id. at 254, 278 N.W.2d at 577.

Smedra, employed as a lineman for the Loup Valley Rural Electrification Association and the first attendant onto the scene, and seven other volunteer certified ambulance attendants responded to the alarm summoning them to the aid of the victim. When they arrived at the scene, they examined the victim in the manner in which they had been trained and concluded that he had died. While the attendants may have been negligent in failing to remember recognized protocol for terminating cardiopulmonary resuscitation, or in failing to follow the proper procedure if they did remember it (perhaps even negligent as a matter of law), no reasonable person could conclude that the volunteer attendants acted without slight care.

We thus conclude that as to the city there exists no genuine issue concerning any fact or as to the inferences to be drawn therefrom and that it is likewise entitled to judgment as a matter of law and was properly granted summary judgment.

AFFIRMED.

WHITE and FAHRNBRUCH, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. SCOTT A. REICHSTEIN, APPELLANT.

447 N.W.2d 635

Filed November 3, 1989. No. 88-943.

1. **Criminal Law: Statutes.** A penal statute is strictly construed and nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute.
2. **Motor Vehicles: Licenses and Permits: Proof.** Revocation for 15 years is not an element of the offense of driving with a revoked license under Neb. Rev. Stat. § 39-669.07(c) (Supp. 1987).
3. **Indictments and Informations.** To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent.
4. **Jury Instructions.** It is the duty of the trial court to instruct the jury on the correct law.
5. **Jury Instructions: Appeal and Error.** It is not error for the trial court to omit inapplicable portions of a statute in a jury instruction.
6. _____: _____. Failure to give a jury instruction only constitutes reversible error if there is prejudice to the defendant.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Calvin D. Hansen for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal from the defendant-appellant's conviction under Neb. Rev. Stat. § 39-669.07(c) (Supp. 1987) of driving while his license was revoked pursuant to multiple convictions of driving while under the influence of alcohol.

On May 29, 1986, the defendant pled guilty to an information in the county court for Red Willow County charging him with his third offense of driving while intoxicated under § 39-669.07 (Cum. Supp. 1986). Section 39-669.07(3) (Cum. Supp. 1986) was applicable to the defendant because of his multiple convictions. That subsection, so far as is applicable

here, appears at § 39-669.07(c) (Supp. 1987), and states:

> If such person (i) has had two or more convictions under this subsection since July 17, 1982 . . . such person shall be guilty of a Class W misdemeanor, and the court shall . . . order such person not to drive any motor vehicle . . . for a period of fifteen years from the date of his or her conviction and shall order that the operator's license of such person be revoked for a like period.

On July 10, 1986, the county court for Red Willow County sentenced defendant as follows:

> IT IS THEREFORE ORDERED that the defendant be sentenced to pay a fine of $250 plus court costs of $51; be sentenced to serve 90 days in jail . . . and it is further ordered that the defendant not drive any motor vehicle in the State of Nebraska for any purpose for a period of five years and that his operator's license be revoked for a like period.

It is apparent that the sentence was erroneous and resulted in defendant's receiving a lesser sentence than required by the statute. First, Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 1986) provides that the minimum fine for a third offense Class W misdemeanor is $500, and second, § 39-669.07(c) provides that the period of revocation shall be 15 years. The defendant's sentence for his third driving while intoxicated conviction included a revocation of his operator's license for 5 years, rather than for the 15 years mandated by the statute. If either the State or defendant had timely appealed from the erroneous sentence of July 10, 1986, the matter could have been corrected. See, *State v. Ulrich*, 217 Neb. 817, 351 N.W.2d 417 (1984); *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974). The sentence may not be corrected at this time, and the case must be decided on the facts before us.

On October 4, 1987, in Lancaster County, defendant was stopped by a police officer who saw that the pickup defendant was driving did not have a rear license plate. Upon investigation, the officer ticketed the defendant for driving under a suspended license. An information was filed alleging that defendant, "being a person whose Nebraska driver's license has been revoked pursuant to subdivision (c) of

subsection 4 of Neb. Rev. Stat. Section Number 39-669.07, [did] operate a motor vehicle on the street or highways of this state."

Defendant was convicted by a jury of violating § 39-669.07(c), which states in relevant part, "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (c) of this section shall be guilty of a Class IV felony."

As set out above, defendant was charged with operating a motor vehicle while his driver's license had been revoked under "subdivision (c) of subsection 4 of Neb. Rev. Stat. Section Number 39-669.07 . . . ." The jury was instructed in the same manner, and defendant requested instructions in the same language. We note that the statute's numbering system is not logically set out. "Subdivision (c)" is not a subdivision of "subsection 4," but subsections (a), (b), and (c), in addition to subsections (1), (2), (3), and (4), are subsections of § 39-669.07. The peculiar numbering does not mean that subsections (a), (b), and (c) refer only to subsection (4). The statutory references, in future cases, should be correctly stated. We recognize that this court has made similar improper references in past cases. There is no prejudice in this case from the numbering of the statute, because both the State and the defendant fully understood the charge and both used the identical improper reference.

The defendant's assignments of error allege that the trial court erred (1) in overruling the defendant's motion to quash the information, (2) in refusing to give defendant's requested jury instructions, and (3) in overruling defendant's motion for a directed verdict based on the insufficiency of the evidence.

Defendant's assignments of error are based upon the language in § 39-669.07(c) which directs the trial court to revoke the operator's license of a multiple offender for 15 years. Defendant argues that the offense of driving with a revoked license under § 39-669.07(c) requires proof not only of prior revocation of the defendant's license pursuant to that section, but also requires proof that the revocation was for 15 years as set out in the statute. We disagree and affirm the judgment of the trial court.

As set out above, the defendant was convicted of violating § 39-669.07(c), which proscribes a person from driving "while his or her operator's license has been revoked pursuant to subdivision (c) of this section . . . ." The statute makes reference to the fact of revocation pursuant to the statute, and not to the length of revocation pursuant to the statute. As we stated in *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 811, 331 N.W.2d 526, 529 (1983), "A penal statute is strictly construed, [and] nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute." (Citations omitted.) The durational requirement argued for by the defendant is not necessary to give effect to the statute. It appears that the Legislature wished to punish persons who drive while their license is revoked pursuant to multiple drunken driving convictions, regardless of the duration of the revocation. The purpose of revocation is to keep those guilty of repeated drunk driving from operating a motor vehicle on Nebraska roadways. The purpose of the subsection under which defendant is charged is to deter people from ignoring the revocation. The section was intended to keep people like the defendant from driving, and not to restrict the trial courts in sentencing. The defendant argues only that the language of the statute refers to revocation and not conviction, and presents no rationale for including a durational element. We hold that revocation for 15 years is not an element of the offense of driving with a revoked license under § 39-669.07(c).

Defendant's reliance on *State v. Blankenfeld*, 229 Neb. 411, 427 N.W.2d 65 (1988), is misplaced. That case interpreted the language of § 39-669.07 as it existed in 1984. At that time the statute referred specifically to one operating a vehicle "while his or her operator's license has been permanently revoked . . . ." Section 39-669.07 was amended in 1986, and the reference to the duration of the revocation was removed from that sentence. *Blankenfeld* is distinguishable from this case.

In his first assignment, defendant contends that the trial court erred in not sustaining his motion to quash the information because the information failed to give the defendant notice of the essential elements of the offense

charged. As we stated in *State v. Golgert*, 223 Neb. 950, 953, 395 N.W.2d 520, 522-23 (1986), " ' "To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent." ' [Citations omitted.]" We also stated, " '[F]or an information to be sufficient it must "inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution of the same offense." ' [Citations omitted.]" *Id.* at 953, 395 N.W.2d at 523. There is no question that the information upheld by the trial court in this case used language equivalent to the statute and informed the accused with reasonable certainty of the charge being made against him. As discussed above, there was no need for the information to charge that the revocation pursuant to the driving while intoxicated statute was for 15 years, because it is not an element of the offense. Defendant's first assignment is without merit.

Defendant's second assignment of error pertains to the trial court's refusal to give two jury instructions requested by defendant. As we stated in *State v. Redding*, 213 Neb. 887, 891, 331 N.W.2d 811, 813 (1983), "[I]t is the duty of the trial court to instruct the jury on the correct law . . . ." The first jury instruction requested by the defendant and refused by the trial court contained the statement that the State was required to prove a 15-year revocation of defendant's operator's license. As discussed above, this was an incorrect statement of the law, and the instruction was rightfully refused by the trial court.

The second jury instruction requested by the defendant and refused by the trial court was a quote of § 39-669.07. The trial court gave the identical instruction, except the trial court deleted irrelevant subsections. The trial court's instruction contained all relevant portions of the statute. It is not error for the trial court to omit inapplicable portions of a statute in a jury instruction. *State v. Poulson*, 194 Neb. 601, 234 N.W.2d 214 (1975). The defendant incorrectly cites to the court a proposition of law that refusal by a trial court to give a requested instruction that correctly states the law is reversible

error. Failure to give a jury instruction only constitutes reversible error if there is prejudice to the defendant. See *Redding, supra*. There was no prejudice in this case, and the trial court correctly refused the defendant's instruction.

In his third assignment of error the defendant argues that there was insufficient evidence to support the defendant's conviction. This assignment is also based upon defendant's argument that revocation for 15 years is an element of the offense charged. The State was not required to prove that the revocation pursuant to § 39-669.07(c) was 15 years in duration. The defendant's third assignment of error is without merit.

The judgment and sentence of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD DEAN RING, APPELLANT.

447 N.W.2d 908

Filed November 9, 1989. No. 88-880.

1. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
2. **Criminal Law: Statutes.** Although a penal statute must be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence.
3. _____: _____. While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
4. **Criminal Law: Words and Phrases.** The language "to commit any felony," as it is used in Neb. Rev. Stat. § 28-1205 (Reissue 1985), is synonymous with "for the purpose of committing any felony."
5. **Homicide: Motor Vehicles: Drunk Driving: Proof: Proximate Cause.** In order to find an accused committed felony motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306 (Reissue 1985) by driving while intoxicated, the State must prove that the accused's intoxication was the proximate cause of the accident and resulting death.
6. **Jury Instructions.** A trial court retains discretion in the wording of jury instructions.
7. **Jury Instructions: Appeal and Error.** Jury instructions must be read together,

and if the instructions taken as a whole correctly state the law, there is no prejudicial error.

8. **Homicide: Motor Vehicles: Negligence.** Contributory negligence is not a defense to the charge of motor vehicle homicide.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed in part, and in part reversed and vacated.

Timothy W. Shuminsky, of Shuminsky, Shuminsky & Molstad, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Defendant, Gerald Dean Ring, appeals convictions entered pursuant to verdicts of felony motor vehicle homicide, in violation of Neb. Rev. Stat. § 28-306 (Reissue 1985), and of using a motor vehicle as a deadly weapon in the commission of the homicide, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1985). His five assignments of error may be summarized as challenging (1) the district court's failure to dismiss the use of a deadly weapon complaint and (2) the district court's charge to the jury. We affirm the motor vehicle homicide conviction, but reverse and vacate the use of a deadly weapon conviction.

The facts of the case are uncontroverted. Ring stipulated that the subject accident occurred, that he was driving the vehicle which collided with the automobile driven by Darlene Sergott, that Sergott died as a result of the accident, and that he pled guilty to a charge of driving while under the influence of alcoholic beverages at the time of the accident. (No issue being raised as to the effect, if any, of that plea on the prosecution of either of the crimes charged in this case, we do not concern ourselves with that matter.)

Although it was very cold on the day of the accident, the road surface was dry, visibility was unrestricted, and driving conditions were generally good. Possibly because of merging traffic, the Sergott automobile was either stopped or moving at

a very low rate of speed when the Ring vehicle, which was moving at a much higher rate of speed, collided with the rear of the Sergott automobile. Ring applied the brakes on his vehicle in an unsuccessful effort to stop before the collision.

The State presented evidence that Ring was intoxicated at the time of the accident and that the consumption of alcohol impairs one's coordination, reaction time, and ability to operate a motor vehicle.

In connection with the first summarized challenge to his convictions, Ring argues that it was not the intent of the Legislature to provide cumulative punishment under § 28-1205 for violations of § 28-306.

Section 28-306 states:

> (1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.
>
> (2) Except as provided in subsection (3) of this section, motor vehicle homicide is a Class I misdemeanor.
>
> (3) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 39-669.01, 39-669.03, or 39-669.07, motor vehicle homicide is a Class IV felony.

With respect to the sections referenced by § 28-306(3), Neb. Rev. Stat. § 39-669.01 (Reissue 1988) deals with reckless driving, Neb. Rev. Stat. § 39-669.03 (Reissue 1988) deals with willful reckless driving, and Neb. Rev. Stat. § 39-669.07 (Reissue 1988) deals with driving while under the influence of alcohol.

In addition, § 28-1205 states:

> (1) Any person who uses a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state, or any person who unlawfully possesses a firearm, knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using firearms to commit a felony.

(2) Use of firearms to commit a felony is a Class III felony.

(3) The crime defined in this section shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed.

Neb. Rev. Stat. § 28-109(7) (Reissue 1985) defines deadly weapon as "any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury." It is therefore apparent that a vehicle can, under appropriate circumstances, be deemed to be a deadly weapon. See, *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987); *State v. Hatwan*, 208 Neb. 450, 303 N.W.2d 779 (1981). See, also, *State v. Williams*, 218 Neb. 57, 352 N.W.2d 576 (1984).

In determining what conduct is proscribed by § 28-1205, we must closely examine the statutory language which reads that "[a]ny person who uses a . . . deadly weapon to commit any felony . . . commits the offense . . . ." Assuming that Ring's vehicle did constitute a deadly weapon in this case, there can be no question that Ring was using his vehicle when he collided with the Sergott automobile. But was he using the vehicle "to commit a felony"? The answer to this critical question depends upon the definition of the word "to" as it is used in the statute. Within the context of § 28-1205, "to" could be interpreted to mean "for the purpose of" or "with the result of." See, Webster's Third New International Dictionary, Unabridged 2401 (1981); 18 The Oxford English Dictionary 163-64 (2d ed. 1989).

The question, then, is whether Ring can be convicted of the deadly weapon charge if he merely used his vehicle *with the result of* committing motor vehicle homicide, or must he have instead used his vehicle *for the purpose of* committing felony motor vehicle homicide. The question is obviously one of statutory interpretation.

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary

meaning. *In re Interest of Richter*, 226 Neb. 874, 415 N.W.2d 476 (1987). Although a penal statute must be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). Furthermore, while a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *In re Interest of Richter, supra*; *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987).

The apparent purposes behind § 28-1205 are to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies and to discourage persons from carrying deadly weapons while they commit felonies. The statute is designed to regulate the manner in which felonies are committed, i.e., with the use or possession of deadly weapons. See Floor Debate, L.B. 38, Judiciary Committee, 85th Leg., 1st Sess. 2679-80, 2682 (Apr. 13, 1977). It cannot reasonably be said that § 28-1205 will dissuade a person from using a deadly weapon to commit an unintentional felony; the two concepts are logically inconsistent. Thus, in order to interpret § 28-1205 in a manner which is consistent with its objective, we hold that the language "to commit any felony," as it is used in that section, is synonymous with "for the purpose of committing any felony."

Our requirement that a conviction under § 28-1205 requires proof that the defendant used a deadly weapon for the purpose of committing a felony comports with our recent analysis in *State v. Pettit, ante* p. 436, 447, 445 N.W.2d 890, 897 (1989), wherein we stated: " 'Strict liability offenses are the exception rather than the rule and will only be found where there is a clear legislative intent not to require any degree of mens rea . . . .' "

> In determining whether criminal intent is an element of manslaughter "upon a sudden quarrel," we bear in mind the general rule that "criminal statutes are interpreted as requiring criminal intent, and this is particularly true in situations in which the offense involved is a felony."

United States v. O'Brien, 686 F.2d 850, 853 (10th Cir. 1982). As the U.S. Supreme Court has observed:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."

Id. at 445-46, 445 N.W.2d at 897.

Thus, in order to convict Ring of the deadly weapon charge in this case, the State was required to prove beyond a reasonable doubt that Ring used his vehicle *for the purpose of* committing a felony. Clearly, the State did not meet this burden of proof. The felony which served as the basis of the deadly weapon charge, felony motor vehicle homicide, is, by definition, a felony which is committed unintentionally. In addition, while Ring may have negligently collided with the Sergott vehicle, nothing in the record indicates that Ring sought or intended to commit the felony motor vehicle homicide. In fact, it is apparent that Ring attempted to avoid the accident which precipitated his felony motor vehicle homicide conviction by applying the brakes of his vehicle. Because Ring did not use his vehicle for the purpose of committing felony motor vehicle homicide, the court erred in failing to dismiss the deadly weapon charge. Consequently, the district court's judgment in that regard must be reversed, and Ring's conviction on that charge must be vacated.

Ring next argues that the district court erred by refusing to instruct the jury that in order to find an accused committed felony motor vehicle homicide in violation of § 28-306 by driving while intoxicated, the State must prove that the accused's intoxication was the proximate cause of the accident and resulting death.

Although Ring's statement of the law is correct, it is difficult to understand the basis for his claim of error. The district court's charge included the very instructions which Ring alleges to have been refused. The charge to the jury included an instruction on the elements of the crime of motor vehicle homicide as follows:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [Ring] of the crime of motor vehicle homicide are:
>
> 1. That [Ring] caused the death of Darlene P. Sergott.
>
> 2. That [Ring] did so unintentionally while engaged in the unlawful operation of a motor vehicle.
>
> 3. That [Ring's] unlawful operation of a motor vehicle consisted of:
>
> a. Driving his motor vehicle while under the influence of alcoholic liquor, or
>
> b. Reckless driving.
>
> 4. That [Ring's] unlawful operation of a motor vehicle was the proximate cause of the death of Darlene P. Sergott.

Another instruction clearly defined the meaning of proximate cause.

As this court has stated, a trial court retains discretion in the wording of jury instructions. All the instructions must be read together, and if the instructions taken as a whole correctly state the law, there is no prejudicial error. *State v. Donhauser*, 231 Neb. 114, 435 N.W.2d 186 (1989); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989).

Finally, Ring claims the district court erred in its charge to the jury by refusing to instruct that "no person shall operate a motor vehicle at such a slow rate of speed as to impede the normal and reasonable flow of traffic." Ring argues that the failure to give this instruction prevented him from arguing that the victim's own conduct, rather than his intoxication or reckless driving, proximately caused the victim's death. The fact is, however, that the instructions given permitted Ring to argue to the jury that his conduct was not the proximate cause of Sergott's death.

What Ring in effect urges here is that his conduct was

excused by Sergott's own contributory negligence. However, this court has consistently held that contributory negligence is not a defense to the charge of motor vehicle homicide. *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989). In *William*, the defendant was charged with felony motor vehicle homicide after a collision occurred while he was attempting to elude a pursuing police officer. At trial, William sought to introduce evidence relating to the possible contributory negligence of both the police officer and the driver of another vehicle which was involved in the accident. A portion of the evidence which William sought to introduce related to police procedures regarding vehicle pursuits. In upholding the trial court's exclusion of the evidence, this court stated:

> " 'In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, [are] not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another.' "

Id. at 89, 435 N.W.2d at 178, quoting *State v. Rotella*, 196 Neb. 741, 246 N.W.2d 74 (1976). The court continued by more specifically addressing the trial court's exclusion of evidence relating to police procedures for vehicle pursuits:

> Regardless of whether the officer violated police policy or was negligent in his decision to pursue the defendant at high speeds, the defendant's actions were still a proximate cause of the death. The defendant's flight from the officer, his high rate of speed, and his failure to stop at the final stop sign all made up " 'the cause without which the death would not have occurred . . . .' " *State v. Dixon*, 222 Neb. 787, 797, 387 N.W.2d 682, 688 (1986). Under these facts, the officer's actions, even if incorrect, did not serve to negate the conclusion that it was the defendant's conduct which was " 'the efficient cause, the one that necessarily [set] in operation the factors that accomplish[ed] the death. . . .' " *State v. Lytle*, 194 Neb. 353, 358, 231 N.W.2d 681, 685 (1975). "The fact that some other agency

> combined with the act of the defendant to cause the death is not a defense unless the other agency is an efficient intervening cause." *State v. Meints*, 212 Neb. 410, 414, 322 N.W.2d 809, 812 (1982).

231 Neb. at 90, 435 N.W.2d at 178.

Thus, we reverse the district court's judgment with respect to the use of a deadly weapon charge and vacate that conviction, but affirm the judgment of the district court with respect to the felony motor vehicle homicide conviction.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

WHITE, J., dissenting in part.

I agree that the motor vehicle homicide conviction and sentence should be affirmed.

The majority agrees that a motor vehicle can be a deadly weapon, citing *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987). A deadly weapon is an instrument or device "which in the manner *it is used* or intended to be used is capable of producing death or serious bodily injury." (Emphasis supplied.) Neb. Rev. Stat. § 28-109(7) (Reissue 1985).

That the jury believed the appellant used a motor vehicle in the commission of felony motor vehicle homicide is obvious. The simple conclusion would be, then, that a deadly weapon (the vehicle) was the device *used* that resulted in the death of another and that unless otherwise prohibited, the appellant could be charged with, convicted of, and punished for use of a weapon to commit a felony.

The majority determines otherwise by concluding that the modest word "to" requires that the actor intend to use the weapon to accomplish the commission of the felony. I submit that the word "to," in the context of § 28-109, more appropriately means the method or instrument by which the thing prohibited is done, and nothing more. I can read no requirement of a subjective intent in either § 28-109 or Neb. Rev. Stat. § 28-1205 (Reissue 1985), save and except as the underlying felony in a § 28-1205 prosecution may require a specific intent.

As the offenses of felony motor vehicle homicide and the use of a weapon to commit a felony are not lesser-included offenses

of one another, and as the Legislature has provided an enhanced penalty, I would affirm both convictions.

FAHRNBRUCH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DARWIN J. ROBINSON, APPELLANT.

448 N.W.2d 386

Filed November 17, 1989. No. 82-028.

1. **Criminal Law: Trial: Evidence.** In order to preserve a question as to the admissibility of evidence not ordered suppressed, a criminal defendant must object to that evidence at trial.
2. **Motions to Suppress.** On a motion to suppress evidence, the trial court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony and other evidence.
3. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, the Supreme Court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly wrong.
4. **Due Process: Identification Procedures.** A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.
5. **Trial: Identification Procedures.** Evidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the person making the out-of-court identification is present at the trial and subject to cross-examination.
6. _____: _____. The factors to be considered in determining the likelihood of misidentification in an extrajudicial identification are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
7. **Police Officers and Sheriffs: Arrests: Probable Cause.** Pursuant to Neb. Rev. Stat. § 29-404.02(1) (Reissue 1985), a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony.
8. _____: _____: _____. When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a felony, the officer has probable cause to arrest without a warrant.
9. **Search and Seizure: Arrests.** When a lawful arrest is made, it is entirely

reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

10. **Constitutional Law: Right to Counsel: Confessions.** Once an accused's sixth amendment right to counsel has attached, the government may not, in the absence of accused's counsel, deliberately elicit incriminating statements from the accused through the use of third persons.
11. **Constitutional Law: Right to Counsel.** An accused's sixth amendment right to counsel attaches at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.
12. **Records: Presumptions: Appeal and Error.** An affirmative showing in the bill of exceptions that a statement in a journal entry contained in the transcript is false overcomes the presumption of truthfulness a journal entry otherwise carries.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Thom K. Cope, of Bailey, Polsky, Cada, Cope & Wood, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

In this reinstated appeal, defendant, Darwin J. Robinson, challenges his convictions pursuant to verdicts on charges of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1985), and the use of firearms to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985), and of being a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1985). His seven assignments of error combine to urge that the trial court erred (1) in declining to suppress certain evidence and (2) in submitting the robbery and firearms charges to the jury and finding the evidence sufficient to support all the charges. We affirm.

II. SUPPRESSION TESTIMONY

At the hearing on Robinson's suppression motions, Marvin Pfeifer, the assistant manager of an Omaha Kwik Shop

convenience store, testified that on January 31, 1981, he was on duty between midnight and 7 o'clock that morning. Robinson entered the store around 6:30 a.m., stood by the magazine rack for some time, and engaged Pfeifer in a "four to five" minute conversation about the weather. According to Pfeifer, "Somebody was getting gas, and I was watching . . . . And when I turned around, he had a knife in my back." Pfeifer turned slightly and was able to see both the knife and that Robinson was the person holding it. Pfeifer complied with Robinson's instruction to "[o]pen the register" and, at Robinson's further order, took all the money from the cash register and placed it in Robinson's hand, whereupon Robinson walked out of the store. As he was leaving the store, employee Michael Klaumann was entering. Pfeifer immediately informed Klaumann that Robinson had robbed the store, and subsequently summoned the police.

Pfeifer described the lighting in the store as "excellent" on the morning in question. Thus, he had ample opportunity to see Robinson's face during the half hour or so Robinson was in the store prior to the robbery, and there was no question in his mind but that Robinson was the man who had robbed him. We note Pfeifer's additional testimony that he had never been shown any photographs by the police, had never seen Robinson in any lineup, and, in fact, had not been called upon to identify the robber until the preliminary hearing in this prosecution.

As Klaumann tells it, he arrived for work at the Kwik Shop at about 6:55 that morning, and as he "was pulling into the parking lot . . . saw that there was a man standing behind Marvin behind the counter — the cash register." Klaumann got out of his automobile, and "the man who was behind the counter" walked out of the door as Klaumann was walking in. Klaumann testified that the area was well lit and that he observed the individual well enough to recognize him again; according to Klaumann, "He had been in the store before."

After Pfeifer told him, "[T]hat's the man that robbed me," Klaumann immediately left and followed Robinson. Using his own vehicle, Klaumann followed a white automobile from the Kwik Shop to a parking lot. Klaumann then located a police patrol vehicle, reported what he had seen, and identified the

automobile for police officers. Klaumann admitted that he had not seen the robber get into the white automobile, nor had he seen the driver exit that vehicle. In any event, Klaumann returned to the Kwik Shop. Sometime later the same day, a police officer approached him there and showed him a photograph, which Klaumann identified as depicting the robber. This was the only time police officers showed any photographs to Klaumann; he participated in no other photographic showup.

However, at "around 10 or 11 in the morning," police officers brought Robinson himself to the Kwik Shop in a patrol vehicle. The officers presented Robinson to Klaumann in the store, and Klaumann told the officers that Robinson was the robber. At the suppression hearing, Klaumann again identified Robinson as the man he had seen walking out of the store as he walked in.

Police Officer James Patterson and Sgt. Don Crinklaw were on duty during the early morning hours of January 31, 1981. About 8:20 a.m., Patterson received a report of a stolen automobile. He also learned from police sources that the vehicle had allegedly been involved in a robbery and had been towed away by police. When Patterson and Crinklaw arrived at the location from which the stolen automobile report had originated, a young woman identifying herself as "Shirley Robinson" told them that her automobile had been stolen. Crinklaw asked for a photograph of Robinson, which the young woman gave him. He left for the Kwik Shop with the photograph before learning the young woman's true identity as that of Edna Lyncook, a fact she admitted when later informed by Patterson that the automobile she had reported stolen was suspected of having been used in a robbery and had been towed by police. Lyncook also told Patterson that Robinson was at her residence, an apartment some flights above Robinson's, and that she had left the door unlocked. Officers then went to the Lyncook apartment and arrested Robinson.

Officers also went to Robinson's apartment and awakened the genuine Mrs. Robinson, who apparently had been sleeping in the Robinson apartment, and, according to Patterson, received permission from her to search the apartment for items

of clothing worn by the Kwik Shop robber. Mrs. Robinson, however, denied having given the police permission to search. As a result of the search, police located a blue windbreaker-type jacket, which Klaumann identified as the jacket worn by the robber.

Robinson was then transported to the police station, where he was searched. Fifty dollars in paper money was found in his back pocket in the following denominations: two $10 bills, one $5 bill, and twenty-five $1 bills.

Robinson's first trial ended in a mistrial. A few days later, the district court took up the State's motion to endorse Robert Koppock as a new witness for use at retrial. Robinson objected "as to the relevancy and as to constitutional issues that were raised by this procedure." The district court then conducted a proceeding in the nature of a suppression hearing to determine the admissibility of Koppock's testimony. At the conclusion of that hearing the district court ruled that "that part of the testimony in which [Robinson] described the place that he robbed and admits [the robbery] will be received."

Koppock's testimony establishes that he was himself arrested on unrelated charges, and as a result, the two men met for the first time in the Douglas County Correctional Center. At the time of his arrest and detention, Koppock was working as an informant for the Nebraska State Patrol, primarily in connection with drug-related activities, and was paid a salary of $100 per week. The State Patrol neither planted Koppock at the jail nor assigned Koppock to work on Robinson's case.

Koppock further testified that he shared the same cellblock with Robinson and that Koppock initiated conversation with Robinson by asking him why he was in prison. On this occasion Robinson indicated the matter was none of Koppock's business. Later, Robinson asked Koppock if he could help Robinson raise bail money. Koppock replied, "Well, I might know some people."

The next day, Robinson initiated a conversation "about this place that he held up," giving the location of the robbed store. Robinson also proposed some kind of "deal" with Koppock whereby each would "snuff" the other's witnesses. Koppock made no "real sure commitment" to the proposal but "just

listened," so that Robinson "took it for granted" that Koppock would participate.

In another conversation, which apparently occurred the same day as the one last mentioned while the two were playing basketball, Robinson talked "about how he . . . held up the Quik [sic] Shop," revealing that as Robinson was leaving the robbed premises, "somebody came in . . . and followed him home." Robinson also related that "he went up to the [designated] Quik [sic] Shop . . . with a butcher knife." At the time of the foregoing conversations, Koppock had made no contact with any law enforcement agency concerning the information Robinson had disclosed.

The State Patrol did, however, become involved a couple of days later when it placed a transmitter on Koppock in order to listen to any conversation Koppock might have with Robinson. That same day, Robinson again talked with Koppock about the robbery. During this conversation, Robinson once more described where the robbery occurred and, apparently for the first time, named Pfeifer as the person from whom he took the money.

III. TRIAL EVIDENCE

Pfeifer and Klaumann were the first witnesses called at the trial which resulted in Robinson's convictions. Their testimony essentially duplicated their suppression hearing testimony. Both men positively identified Robinson in court as the man who had committed the robbery. Several police officers were also called; their testimony, too, essentially repeated that adduced at the suppression hearing. Patterson further testified that the door to Lyncook's apartment was unlocked and that when he and another officer entered the apartment, they found Robinson seated in a chair. Lyncook testified that she had accompanied police officers from Robinson's apartment to her own and that she was present when Robinson was placed under arrest.

Although Lyncook testified that police officers removed Robinson's photograph from his apartment without her permission and after she had admitted to them that she was not the real Mrs. Robinson, Crinklaw testified as he had at the suppression hearing that while laboring under the impression

that Lyncook was Mrs. Robinson, he received permission from her to take Robinson's photograph from the apartment. According to Crinklaw, he left Robinson's apartment with the photograph before learning that the woman who had allowed him to take it was not Robinson's wife.

The State also called Koppock as a trial witness, and he testified substantially as he had in the earlier hearing regarding the statements Robinson made while both were in jail, including Robinson's identification of Pfeifer by name. While Robinson made no objection to Koppock's trial testimony, or indeed to any of the identification testimony adduced at trial, it must be borne in mind that although the law now is that in order to preserve a question as to the admissibility of evidence not ordered suppressed, a criminal defendant must object to that evidence at trial, *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987), such objection was not required at the November 1981 trial which resulted in Robinson's conviction, *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978).

In the course of the trial the State offered, and the district court received into evidence, over Robinson's objections, the photograph and windbreaker jacket described earlier, as well as the money removed from Robinson's person at the time of arrest.

IV. ANALYSIS

1. Nonsuppression of Evidence

We begin our analysis of the first summarized assignment of error by recalling that on a motion to suppress evidence, the trial court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony and other evidence. In reviewing a trial court's ruling as a result of a suppression hearing, the Supreme Court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly wrong. *State v. One 1987 Toyota Pickup, ante* p. 670, 447 N.W.2d 243 (1989); *State v. Marcotte, ante* p. 533, 446 N.W.2d 228 (1989); *State v. Bowen,* 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Andersen,* 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Martin,* 232 Neb. 385, 440 N.W.2d 676 (1989).

a. Eyewitness Testimony

Robinson first argues, in sum, that Klaumann's in-court identifications were impermissibly tainted because the police used but one photograph and but one person in showups on the day of the robbery. In effect, Robinson argues that Klaumann identified not the robber in court, but, rather, the person depicted in the one-photograph and the one-person showups, both of which showups were of the allegedly innocent Robinson. Robinson's contentions in this connection are clearly without merit.

This court has recently had occasion to consider the circumstances under which eyewitness identifications may be admissible despite alleged extraneous influences such as those complained of here. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988). In *Trevino*, this court noted:

> A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . . . [E]vidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the person making the out-of-court identification is present at the trial and subject to cross-examination.
>
> The factors to be considered in determining the likelihood of misidentification . . . are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

230 Neb. at 510, 432 N.W.2d at 516. See, also, *State v. Sardeson, supra*; *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989).

Applying these criteria to the facts of the case presently before us, we note that Klaumann testified that he got a good, clear look at Robinson as their paths crossed in the Kwik Shop doorway on the morning of the robbery and that he recognized

Robinson at that time as one whom he had seen in the store before. Not more than 5 hours passed between this time and the moment police officers presented Robinson's photograph and, later, Robinson himself to Klaumann for identification, a period not so long as to raise a significant likelihood that Klaumann might have forgotten important details or become confused about whom he had seen. These are sufficient indicia of reliability to satisfy foundational requirements for Klaumann's testimony and to present to the jury as a question of fact the weight to be accorded that testimony.

Robinson's apparent argument that Pfeifer made no conclusive identification of Robinson as the robber is simply not supported by the record. The fact of the matter is that Pfeifer, who was never shown a photograph of Robinson, positively identified him as the robber both at the suppression hearing and at the subsequent trial.

b. Physical Evidence

Regarding use by the State of the items seized in the course of Robinson's arrest, Robinson argues that the photograph and the jacket were illegally seized without benefit of a search warrant and should therefore have been suppressed.

Concerning the jacket, although not without contradiction, there is testimony that Robinson's real wife and coresident with him in their apartment gave police officers permission to search the apartment, in the course of which consensual search the jacket was located and seized. A warrantless search of a house may be justified when the police have obtained consent to the search from a party who possesses common authority over, or other sufficient relationship to, the premises sought to be inspected. *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989). Robinson's contention regarding the jacket is without merit.

Concerning the photograph, the record indicates that Lyncook represented herself to be Robinson's wife at Robinson's request, and there is evidence that while in that guise, she permitted police officers to remove the photograph from Robinson's apartment. Insofar as Lyncook was acting at Robinson's request, we have no difficulty holding that when she

permitted police officers to remove the photograph from Robinson's apartment, she was acting within the scope of an "other sufficient relationship to . . . the premises sought to be inspected," *State v. Bowen, supra* at 733, 442 N.W.2d at 214, to render the police officers' act of taking the photograph not constitutionally infirm. Robinson's argument in this connection is also without merit.

Although no complaint appears to be made about the money received in evidence, we nonetheless observe that Neb. Rev. Stat. § 29-404.02(1) (Reissue 1985) provides, among other things, that a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. We have accordingly held that when a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a felony, the officer has probable cause to arrest without a warrant. *State v. Wickline, supra*; *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988). We have also held that when a lawful arrest is made, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *State v. Marco, supra*, citing *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982).

There was sufficient evidence to support a finding that the police had permission to enter the apartment in which Robinson was found and had probable cause to arrest him without a warrant. Robinson's arrest being lawful, the seizure of money from his person was likewise lawful and therefore properly received in evidence.

c. Testimony of Informant

Relying on the holdings of the U.S. Supreme Court in *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), Robinson contends that the admission of Koppock's testimony at his trial violated his right to counsel under the sixth amendment to the U.S.

Constitution. This sixth amendment right is not to be confused with the right to be informed of the right to counsel which under certain circumstances arises as an incident of the fifth amendment right against self-incrimination. As said in *State v. Saylor*, 223 Neb. 694, 701-02, 392 N.W.2d 789, 794-95 (1986), *cert. denied* 481 U.S. 1038, 107 S. Ct. 1975, 95 L. Ed. 2d 815 (1987), quoting *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972): " '[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the . . . initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " See, also, *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), *reh'g denied* 431 U.S. 925, 97 S. Ct. 2200, 53 L. Ed. 2d 240. The sixth amendment right attaches at that time because

> after the initiation of adversary criminal proceedings, " 'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.' "

Maine v. Moulton, supra at 170.

In *Massiah v. United States, supra*, Massiah and another man, one Colson, were indicted for violating narcotics laws and were released on bail. Colson then agreed to cooperate with government agents in their investigation of the activities and allowed a government agent to install a radio transmitter in his automobile. While the agent listened over the radio, Massiah had a lengthy conversation with Colson, during which Massiah made several incriminating statements which were then received in evidence at Massiah's trial.

The U.S. Supreme Court reversed Massiah's conviction on the ground that his sixth amendment right to counsel was violated in that "there was used against [Massiah] at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted

and in the absence of his counsel." *Id.* at 206.

In *United States v. Henry, supra*, the defendant Henry had been indicted for armed robbery and imprisoned. Government agents then contacted Nichols, another inmate at the same facility at which Henry was being housed and who had been engaged for some time as a paid informant for the Federal Bureau of Investigation. After Nichols informed an agent that he shared a cellblock with Henry, the agent told him to be alert to any statements Henry made but not to initiate any conversation with Henry or question him about the robbery. Thereafter, Nichols informed the agent that Henry had made incriminating statements, and Nichols was paid for furnishing the information. Henry's statements to Nichols were then introduced at Henry's trial.

The *Henry* Court determined that under *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), the question was whether "a Government agent 'deliberately elicited' incriminating statements from Henry . . . ." *United States v. Henry*, 447 U.S. 264, 270, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). In concluding that the agents had done so, the Court focused on three factors: "First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols." *Id.* The Court further noted that the government agent "was aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry's suspicion." *Id.* "Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." *Id.* at 271. The Court held that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id.* at 274.

The U.S. Supreme Court next applied the *Massiah* standard in *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). There, after having been indicted, Moulton had

made incriminating statements in a meeting with his accomplice, Colson, who in cooperation with the police wore a wire transmitter to record the conversation. Although police instructed Colson not to question Moulton but simply to "be himself" in conversation, Colson pretended poor memory of the details of the crimes and "reminisced" about events surrounding the crimes in order to cause Moulton to make several incriminating statements. *Maine v. Moulton, supra* at 165-66.

The State of Maine contended that under *Massiah* and *Henry*, the sixth amendment is violated only when the police set up the conversation with the accused or take some equivalent intentional step, and, thus, because Moulton initiated the meeting, his sixth amendment rights were not violated. The *Moulton* Court answered:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. [Citation omitted.] However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Id. at 176.

Applying the above principle to the facts of *Moulton*, the

Court determined it to be clear that

> the State violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant . . . . The police thus knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel. As in *Henry*, the fact that the police were "fortunate enough to have an undercover informant already in close proximity to the accused" does not excuse their conduct under these circumstances. . . . By concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment.

Maine v. Moulton, supra at 176-77.

The most recent examination of the issue by the U.S. Supreme Court appears to be found in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). Therein, after having been arraigned on charges related to a robbery and murder, the defendant Wilson was placed in a cell with another inmate, Lee, who previously had agreed with police to act as an informant. The police instructed Lee not to ask Wilson any questions, but simply to " 'keep his ears open' " for the names of other perpetrators in the crimes. *Id.* at 439. Lee reported to the police certain incriminating statements that Wilson had made, and such statements were adduced at his trial.

In upholding Wilson's conviction, the Court held:

> Since "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," [citation omitted], a defendant does not make out a violation of [the sixth amendment right to counsel] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. at 459. Because Lee was instructed only to listen to Wilson for the purpose of identifying the other participants in the crimes and Lee did not ask Wilson any questions but " 'only listened' " to Wilson's " 'spontaneous' " and " 'unsolicited' " statements, the Court held there was no sixth amendment violation. *Id.* at 460.

The *Kuhlmann* Court explained that the sixth amendment violations in *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), and *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985), arose because the informants developed relationships of trust and confidence with the defendants and stimulated conversations with the defendants in order to elicit incriminating statements. The actions of the informants in those cases, said the Court, amounted to secret interrogation. Although in *Kuhlmann*, Lee at one point suggested to Wilson that his first version of his participation in the crimes " 'didn't sound too good,' " 477 U.S. at 460, the Court determined that such was not enough to amount to secret and deliberate interrogation.

Finally, the *Kuhlmann* Court emphasized, "As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann, supra* at 459.

To return to the case at hand, the conversations between Robinson and Koppock occurred several months after the initiation of formal charges against Robinson and, thus, after Robinson's sixth amendment right to counsel had attached. Thus, the question resolves itself into whether Koppock's conversations with Robinson were such as to be the equivalent of direct police interrogation.

Robinson in effect argues that because Koppock was an informant paid to find crime wherever it existed, all conversations with him constituted secret and deliberate interrogation by the State. *Kuhlmann*, however, makes clear that such is not the case. That case teaches that in order to show the sixth amendment right to counsel has been violated, an accused must establish more than the mere fact the informant

had a preexisting arrangement with the State. The accused must show that there was interrogation which was deliberately designed to elicit incriminating remarks. The evidence in this case falls far short of establishing that Koppock so interrogated Robinson. The only direct question Koppock posed to Robinson was why Robinson was in prison. Given the setting in which the question was asked, it amounted to nothing more than a greeting. So far as the record reveals, the incriminating statements Robinson later made were volunteered on his part. Even those made after Koppock was equipped with a transmitter by the State Patrol are not shown to have been made as the result of questioning by Koppock. All the record shows is that Koppock initially, and later Koppock and the State Patrol, listened while Robinson volunteered information about the crimes in question. Under that state of the record, it cannot be said the district judge was clearly wrong in concluding that Koppock's testimony was relevant and that there existed no constitutional objection to its admission in evidence.

2. Submission of Charges and Sufficiency of Evidence

a. Procedural Challenge

With respect to the second summarized assignment of error, Robinson first claims the trial judge erred in submitting the use of firearms charge to the jury, because he had previously sustained Robinson's motions to dismiss that charge.

This claim rests on the following exchange, which took place at the close of the State's case:

> [Defense trial counsel]: . . . Comes now the defendant . . . and moves the Court to—for a dismissal of the complaint of robbery for the reason that the State has failed to prove a prima facie case.
>
> THE COURT: I think I am going to sustain part of that as to [the use of firearms count].

Later, at the close of Robinson's case, the following brief exchange occurred: "THE COURT: Does the Defendant renew his motions? [Defense trial counsel]: Yes, your Honor. THE COURT: Same ruling."

However, the journal entry relating to Robinson's motion at

the close of the State's evidence reads: "Defendant moves for a dismissal as to both counts, motion for dismissal argued and overruled." As to the fate of Robinson's motion at the close of all the evidence, the journal entry reads: "Defendant renews motion of dismissal and same is overruled." We have said that an affirmative showing in the bill of exceptions that a statement in a journal entry contained in the transcript is false overcomes the presumption of truthfulness a journal entry otherwise carries. *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986). The trial judge's equivocal statement that he thought he would sustain Robinson's motion with respect to the firearms charge and dismiss that charge is not sufficient to overcome the presumption of the truthfulness of the journal entry in this case. The reasonable conclusion to be reached on the record presented is that on further reflection the trial judge changed his mind and ruled other than as he first thought he would.

b. Substantive Challenge

Robinson further claims, with respect to the second summarized assignment of error, that the trial judge should have directed verdicts in his favor and that the evidence was insufficient to support the jury's verdicts. Our analysis necessarily begins with the rule that on a defendant's motion to dismiss for insufficient evidence of the crime charged, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). Similarly, in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Broadstone, ante* p. 595, 447 N.W.2d 30 (1989); *State v. Swigart, ante* p. 517, 446 N.W.2d 216 (1989); *State v. Wokoma, ante* p. 351, 445 N.W.2d 608 (1989).

Section 28-324 provides in part, as it did at all times relevant

to this case, that "[a] person commits robbery if, with intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." Section 28-1205(1) provides, as it did at all relevant times, that "[a]ny person who uses a . . . knife . . . to commit any felony which may be prosecuted in a court of this state . . . commits the offense of using firearms to commit a felony." With respect to the robbery and firearms charges, the record discloses that at the close of the State's case, evidence, including the testimony of two eyewitnesses, had been adduced which positively identified Robinson as the individual who had taken cash from convenience store clerk Pfeifer at knife point during the early morning hours of the day in question. Nothing in Robinson's case undermined the State's case, and the district court was correct so to rule in connection with Robinson's various motions to the contrary made at the close of the State's case, at the close of all the evidence, and following conviction.

With respect to the habitual criminal charge, evidence was adduced which establishes that Robinson was sentenced and committed to prison in this state for terms of not less than 1 year on prior separate counseled convictions, to wit, 4 years on a robbery charge and two consecutive 3-year terms on charges of robbery and the use of firearms arising out of another event. Section 29-2221 provides in relevant part, as it did at all times relevant to this case, that "[w]hoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state . . . for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . ." There is thus no question but that the trial judge correctly determined Robinson to be a habitual criminal.

V. DECISION

Inasmuch as the record fails to sustain any of Robinson's summarized assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

The majority correctly reiterates the current appellate

standard for review of a suppression hearing, namely, the trial court's findings for a suppression order will be upheld unless "the trial court's findings of fact . . . are clearly wrong." The majority then moves in seven-league boots to the conclusion that "it cannot be said the district judge was clearly wrong in concluding . . . that there existed no constitutional objection" to admission of the questioned testimony from Koppock, the informer.

At the suppression hearing, defense counsel emphasized that Koppock was a "paid agent of the State Patrol," but the district judge surmised that Koppock's status as the State Patrol's paid informant would "go to the credibility and amount of consideration that the Jury [would] give" to Koppock's testimony. Additionally, the district judge remarked and ruled:

> Well, that part of the testimony in which he [Robinson] described the place that he robbed and admits robbing will be received. It's not protected by Miranda at all. It's a voluntary statement made to a private citizen.
>
> . . . .
>
> . . . They are statements made to a private citizen at the time and they are voluntary statements. The Miranda [sic] absolutely does not cover. Those statements will be received.

Inasmuch as *Kuhlmann v. Wilson,* 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), and *Maine v. Moulton,* 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985), had not been decided in 1981 when the suppression hearing occurred in Robinson's case, the colloquy between court and counsel at the suppression hearing clearly dispels any notion of prescience or clairvoyance in the eventual constitutional pronouncements concerning an accused's sixth amendment right to counsel, subsequently expressed in *Kuhlmann* and *Moulton.*

Rather, at the suppression hearing the district judge focused on *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which dealt "with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 477. Thus, *Miranda*

concerned procedural safeguards to protect the privilege against self-incrimination during custodial interrogation by law enforcement personnel.

In *Sims v. Georgia*, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593 (1967), which involved voluntariness of a confession, the court addressed specificity in a suppression order and stated: "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." 385 U.S. at 544.

In a similar vein, the eighth circuit, in *Evans v. United States*, 375 F.2d 355 (8th Cir. 1967), examined a suppression hearing wherein the trial court, having considered voluntariness and the *Miranda* admonition for admissibility of Evans' custodial statements to police, failed to make any express finding that Evans' confession was voluntary or obtained in conformity with *Miranda*. In reversing Evans' conviction based on evidence which included Evans' custodial statements, the eighth circuit held that the district court was required to make a finding on the record with "unmistakable clarity" that the *Miranda* admonition had been administered and that the defendant had voluntarily, knowingly, and intelligently waived the right to counsel in connection with a voluntary confession or statement used as evidence against the defendant. 375 F.2d at 360.

In view of *Sims* and *Evans*, a finding concerning a sixth amendment right in relation to a suppression hearing should also appear in the record with "unmistakable clarity."

All of which brings us to the suppression hearing in Robinson's case. The record substantiates a series of contacts between Koppock and Robinson. In an initial contact and inquiry, Robinson asked Koppock about assistance in obtaining bail, a conversation which was then followed by a later discussion about the gravity of the offense charged against Robinson, namely, armed robbery. After Robinson and Koppock had engaged in still another and subsequent conversation regarding some of the occurrences in the Kwik Shop robbery, the State Patrol "wired" Koppock for a return encounter with Robinson, during which Robinson identified

the location and victim of the robbery. Beyond any doubt, the State Patrol orchestrated and choreographed the scene between Koppock and Robinson. Putting aside the district court's obviously incorrect conclusion that Koppock, a paid informer, was a "private citizen," the district court's finding concerning incriminating information in reference to Robinson's fifth amendment rights (*Miranda*) is distinctly unrelated to Robinson's sixth amendment rights (*Massiah*, *Henry*, *Moulton* and *Kuhlmann*), which supply the premise for the majority's conclusion in Robinson's appeal. The fifth amendment has yet to become the sixth amendment, either in the U.S. Constitution or in the district court's findings for the suppression order under examination.

To conclude that the district court was correct, or at least "not clearly wrong," regarding a determination about Robinson's sixth amendment right is this court's approbatory conclusion regarding correctness in something which never occurred. Consequently, if the sixth amendment is the keystone in the suppression question, as the majority believes, there should be a hearing to determine the sixth amendment issues regarding Robinson's statements. Otherwise, this court has adopted a de novo standard of review for the suppression hearing and has abandoned the standard of "clearly wrong" which has subsisted until Robinson's case.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS, SUCCESSOR IN INTEREST TO NORFOLK PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. PHILIP G. SCHMER, APPELLEE, AND DORIS M. SCHMER, APPELLANT.

448 N.W.2d 123

Filed November 17, 1989. No. 87-1002.

1. **Foreclosure: Equity: Appeal and Error.** A foreclosure action is grounded in equity. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a

material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Contracts: Guaranty: Liability.** Nebraska adheres to the rule of strict construction of guaranty contracts. When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
3. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** An absolute guaranty is a contract by which the guarantor has promised that if the debtor does not perform his obligation or obligations, the guarantor will perform some act for the benefit of the creditor.
4. **Guaranty: Notice.** An absolute guaranty of payment is enforceable at any time without demand and notice of default.
5. **Contracts: Guaranty: Limitations of Actions.** The statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues.
6. **Guaranty: Liability: Debtors and Creditors.** A guarantor's liability arises when the principal debtor defaults.
7. **Contracts: Abandonment: Words and Phrases.** Abandonment of a contract occurs where one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior.
8. **Laches.** The defense of laches is not favored in Nebraska. It will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary.
9. **Debtors and Creditors: Principal and Surety: Security Interests: Waiver.** Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (1) surrenders or releases the security, (2) willfully or negligently harms it, or (3) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Marion F. Pruss for appellant.

James T. Gleason, of Stalnaker, Becker, Buresh & Gleason, P.C., for appellee Production Credit Association.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

The appellant, Doris M. Schmer, complains that in an action to foreclose her ex-husband's farm and to enforce her guaranty, the trial court erred in finding that a mortgage she gave in 1974 was valid and superior to her lien for alimony, child support,

and property settlement.

The appellant also complains that the Madison County District Court erred in holding that her 1975 guaranty for the payment of her husband's debts had continuing validity and in holding that the mortgage and guaranty were cumulative liabilities. We affirm.

A foreclosure action is grounded in equity. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Mid-America Maintenance v. Bill Morris Ford*, 232 Neb. 920, 442 N.W.2d 869 (1989).

Doris and Philip G. Schmer, then husband and wife, were indebted on a note in the sum of $83,825, payable September 5, 1975, to the Norfolk Production Credit Association (NPCA), predecessor in interest to Production Credit Association of the Midlands (PCA) (both associations oftentimes collectively referred to as PCA). The loan financed the Schmers' cattle operation. On September 3, 1974, as security for their $83,825 indebtedness, the Schmers executed and delivered to NPCA a "Collateral Agreement" and a payable-on-demand $75,000 collateral note, which was secured by a $75,000 demand mortgage on two parcels of their farmland (hereinafter called parcel 1 and parcel 2).

The agreement collaterally secured

> any renewal or extension of the indebtedness evidenced by the notes last described [the $83,825 note] *or any other indebtedness now owed by the undersigned to said association or hereafter incurred by said undersigned with said association either jointly or severally* or on the faith or credit of their community or separate estates or either of said estates. It is the express agreement of the parties that the consideration for this pledge is the granting of a loan by the association evidenced by the obligations last above mentioned.
>
> Further, *this is a continuing agreement and all rights,*

> *powers, and remedies hereunder shall apply to all past, present, and future indebtedness of the undersigned to the association* notwithstanding the death, dissolution, incapacity, or insolvency of the undersigned, and shall continue in full force until all indebtedness shall have been paid in full.

(Emphasis supplied.)

Instead of executing and delivering renewal notes, Doris Schmer, on October 13, 1975, executed a $125,000 "Continuing Guarantee." She thereby guaranteed to NPCA and its successors

> "the payment at maturity of any or all indebtedness evidenced by any notes, security agreements, mortgages, negotiable instruments, or other evidences of indebtedness of Philip G. Schmer, to [NPCA], whether now in existence or hereinafter incurred by Philip G. Schmer, for any purpose and in any amount whatsoever."

By this document, Doris Schmer bound her separate existing and future-acquired property.

On March 11, 1981, a decree was entered dissolving the Schmers' marriage. Doris Schmer was awarded alimony, child support, and a monetary property settlement.

Thereafter, on April 22, 1981, Philip Schmer executed and delivered to NPCA an operating note and open end real estate mortgage in the amount of $260,000. The pledged real estate consisted of three parcels of land (parcels 1 and 2 and a parcel 3), which included the farmland previously pledged to NPCA in the 1974 real estate mortgage. The unpaid balance of the April 22 note was renewed on May 13, 1982, in the amount of $228,000.

In December 1982, Philip Schmer filed for relief under chapter 11 of the U.S. Bankruptcy Code. That action was dismissed on July 23, 1985, on NPCA's motion. On December 9, 1985, NPCA obtained a judgment on the May 13, 1982, renewal note. NPCA executed on Philip Schmer's equipment, sold it, and applied the proceeds to the debt. In an attempt to satisfy the remainder of the debt, PCA, as successor in interest to NPCA, instituted a foreclosure proceeding on the parcels of farmland pledged in the 1974 and 1981 mortgages. PCA also

asked the court to enforce the personal guaranty of Doris Schmer.

In its foreclosure decree, the trial court concluded that Philip Schmer was indebted to appellant by reason of the 1981 divorce decree in the sum of $288,604.51, including interest, and was indebted to PCA in the sum of $390,482.65. With respect to the three parcels of property, the trial court concluded that PCA had a first lien on parcels 1 and 2 in the amount of $75,000 by reason of the original 1974 real estate mortgage; Doris Schmer had a second lien on parcels 1 and 2 in the amount of $288,604.51 by reason of the dissolution decree; and PCA had a third lien on parcels 1 and 2 in the amount of $315,482.65, the total sum owed PCA being offset by the $75,000 first lien. With respect to parcel 3, the trial court concluded that Doris Schmer had a first lien in the amount of $288,604.51, and PCA had a second lien in the amount of $315,482.65.

The trial court further concluded that the $125,000 guaranty given by appellant had not been revoked and was in full force and effect.

In her assignments of error, the appellant specifically claims that the trial court erred in holding (1) "the 1974 PCA mortgage to be a valid lien superior to the lien of Doris Schmer," (2) "the guaranty executed by Doris Schmer in 1975 to have continuing validity," and (3) "the guaranty and the mortgage were cumulative liabilities."

In an effort to refute PCA's first lien on parcels 1 and 2, appellant claims that the 1974 collateral note and mortgage were discharged by payment in accordance with the principle applied in *Diesel Service, Inc. v. Accessory Sales, Inc.*, 205 Neb. 381, 288 N.W.2d 258 (1980). *Diesel* held that where payments are made on an open account, and no appropriation has been made by either party concerning the payments, the law will apply them in discharge of the earliest items. Under that principle, and based on the payments made to NPCA, appellant asks this court to hold as a matter of law that the 1974 mortgage had been paid "either on August 9, 1975, when Philip Schmer made a $77,373.98 payment on his account or, at the latest, on July 2, 1979, when the account reflected a zero balance." Brief for appellant at 21. Appellant's reliance on

Diesel is misplaced. The $75,000 collateral note, as previously stated, was given solely as collateral. No payments were ever made on this collateral note. Rather, all payments resulted in decreasing the debtors' obligation as reflected in NPCA's and PCA's loan transaction records.

Appellant further contends that the 1974 real estate mortgage is void because it fails to state that it is intended to secure future advances in accordance with Neb. Rev. Stat. § 76-238.01 (Reissue 1986). Section 76-238.01 provides that optional future advances made after written notice of a lien or claim against the real estate shall be junior to the lien or claim even when a mortgage validly securing future advances is of record. However, since the 1974 mortgage secured only a collateral note and not future advances, this contention fails.

Because the 1974 mortgage pledging parcels 1 and 2 is valid and the execution and delivery of the collateral note, collateral agreement, and 1974 mortgage predate appellant's rights arising under her divorce decree, the trial court correctly concluded that PCA's $75,000 lien had first priority on parcels 1 and 2.

Doris Schmer's second assignment of error contests the trial court's holding that the $125,000 guaranty she executed in 1975 continued to be valid and enforceable. Appellant claims that by the time of the foreclosure, PCA had lost its rights under the guaranty for each of the following reasons: (1) Doris Schmer signed only in her capacity as a married woman, and once her marriage was dissolved, the underlying consideration for the guaranty no longer existed; (2) PCA failed to notify her of subsequent transactions between itself and Philip Schmer; (3) the statute of limitations barred enforcement; (4) the guaranty became void as a result of abandonment or, in the alternative, laches; and (5) PCA was negligent in failing to attain possession of the collateral.

Appellant first argues that once her marriage was dissolved on March 11, 1981, any advances made by PCA to Philip Schmer were not entitled to protection of the guaranty. Appellant cites no case law to support this proposition. Rather, she asserts that the law of strict construction of contracts supports this proposition.

The paragraph of the guaranty appellant relies on states: "I, Doris M. Schmer, *a married woman,* do execute this Guarantee with reference to my individual estate on the faith and credit thereof and with the intent to charge my separate property for its payment, binding that property which I now own and that which I may hereafter acquire." (Emphasis supplied.) The language "a married woman" in this provision is nothing more than a term of description. PCA was not a party to the Schmers' dissolution action. Its rights under the guaranty could not be affected by any actions in the dissolution proceedings.

Secondly, appellant contends that PCA's failure to give her notice of its subsequent transactions with Philip Schmer discharged her liability as guarantor. The "Continuing Guarantee" states that appellant guarantees "the payment at maturity of any or all indebtedness evidenced by any notes . . . of Philip G. Schmer . . . whether now in existence or hereinafter incurred" and that the guaranty "shall extend to any renewals or extensions of the . . . obligations."

Nebraska adheres to the rule of strict construction of guaranty contracts. *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 417 N.W.2d 162 (1987). " 'When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.' " *Id.* at 293, 417 N.W.2d at 163 (quoting *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922)). The language of Doris Schmer's guaranty is clear and unambiguous. There is no provision in the guaranty requiring PCA or its predecessor to give notice to appellant of its transactions with Philip Schmer. Such a notice requirement cannot be read into the contract.

Furthermore, Doris Schmer's guaranty is absolute. An absolute guaranty is a contract by which the guarantor has promised that if the debtor does not perform his obligation or obligations, the guarantor will perform some act for the benefit of the creditor. *Home Savings Bank v. Shallenberger*, 95 Neb. 593, 146 N.W. 993 (1914). An absolute guaranty of payment is enforceable at any time without demand and notice of default. *First West Side Bank v. Herzog*, 204 Neb. 356, 282 N.W.2d 38 (1979). While this court has stated that bad-faith failure to give

notice of default may operate to discharge a guarantor in a case where such neglect is unreasonable and unconscionable, *Furst v. Kruger*, 132 Neb. 54, 271 N.W. 156 (1937), there is no evidence in this case that PCA acted in bad faith or unreasonably.

Thirdly, PCA's effort to enforce the guaranty is not barred by the statute of limitations. The statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues. *Lake v. Piper, Jaffray & Hopwood Inc.*, 219 Neb. 731, 365 N.W.2d 838 (1985); *Cummins v. Tibbetts*, 58 Neb. 318, 78 N.W. 617 (1899). A guarantor's liability arises when the principal debtor defaults. *Murphy v. Stuart Fertilizer Co.*, 221 Neb. 767, 380 N.W.2d 631 (1986). In this case, Philip Schmer defaulted in 1982. This action was brought April 16, 1986, against Doris Schmer on her guaranty, well within the 5-year statute of limitations in Neb. Rev. Stat. § 25-205 (Reissue 1985).

Fourthly, there is no evidence that PCA abandoned Doris Schmer's guaranty. Abandonment of a contract occurs where one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior. *Reifschneider v. Nebraska Methodist Hospital*, 212 Neb. 91, 321 N.W.2d 445 (1982). Appellant fails to demonstrate how PCA abandoned the guaranty. She points to the deletion of her name from PCA's transaction records in March of 1981 as evidence of the abandonment. Such an act by PCA may very well reflect PCA's view as to appellant's responsibility on the principal obligation. However, it would hardly affect her liability on a separate obligation evidenced by a separate document, the guaranty.

Appellant also points to the testimony of former loan officer and past president of NPCA Eldon Peters as evidence of abandonment. Peters testified that he could not say whether PCA relied on the guaranty without looking to see if the guaranty was carried forward as collateral after the divorce. This testimony does not prove that PCA abandoned the guaranty. Without more, it cannot be concluded that PCA abandoned the guaranty.

PCA is not barred from enforcing the guaranty because of

laches. The defense of laches is not favored in Nebraska. "[I]t will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary." *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 78, 434 N.W.2d 703, 706 (1989). The evidence clearly shows that PCA sought to collect the indebtedness, on which appellant was collaterally liable, from Philip Schmer as early as 1981. Further attempts at collection from Philip Schmer were stayed by his filing of bankruptcy. Following dismissal of the bankruptcy proceedings, PCA once again sought to collect the debt from Philip Schmer. PCA eventually obtained a judgment on the 1982 renewal note and exhausted Philip Schmer's personal property in partial satisfaction of the debt. It cannot be said that PCA acted negligently in enforcing its rights to the detriment of appellant.

Appellant contends that PCA's negligence is evidenced by the fact that from the time of Philip Schmer's default in 1982 until the time PCA obtained judgment in 1985, the collateral supporting Philip Schmer's obligation to PCA continued to decrease in value. Appellant relies upon *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb 292, 237 N.W.2d 645 (1976), which cited the Restatement of Security § 132 (1941):

> "Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) wilfully or negligently harms it, or (c) *fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action.*"

(Emphasis supplied.) *Custom Leasing* at 298, 237 N.W.2d at 649.

As previously stated, neither NPCA nor its successor, PCA, acted unreasonably in enforcing its rights. It is not within the province of the court to attach blame for the mere precipitous decline in the value of real estate.

Appellant's third assignment of error, claiming the trial court erred in holding that the guaranty and the mortgage were cumulative liabilities, is equally without merit. These liabilities

are evidenced by two separate instruments, executed at separate points in time. They were drafted without any reference to each other. They are independent liabilities.

Accordingly, based upon the narrow issues that this court was called upon to address, we affirm.

AFFIRMED.

LARRY B. MEYERSON, APPELLANT, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLEE.
JUAN ROQUE, APPELLANT, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLEE.
MALCOLM BALLINGER, APPELLANT, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLEE.

448 N.W.2d 129

Filed November 17, 1989. Nos. 87-1138, 87-1139, 87-1140.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader.
2. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
3. **Demurrer.** When a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained.
4. **Corporations: Actions: Parties.** As a general rule a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.
5. **Corporations: Actions: Parties: Proof.** There is a well-recognized exception to the general rule relating to actions by shareholders: If the shareholder properly establishes an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, rather than as a shareholder, such individual action may be maintained. To come within this exception, the shareholder must show that his or her loss is separate and distinct from that of other shareholders of the corporation or that there is a special duty owed by a wrongdoer to a shareholder.

6. **Corporations: Actions: Parties.** It is only where the injury to a shareholder's stock is peculiar to him or her alone, such as in an action based on a contract in which the shareholder is a party, on a right belonging to him or her, or on a fraud affecting him or her directly, and does not fall alike upon other shareholders, that the shareholder may recover as an individual.
7. **Corporations: Actions: Parties: Restitution.** When an injury is to the collective rights of shareholders and the corporate property has been augmented by restitution, the shareholders will be fully indemnified. If a shareholder is permitted to bring an action personally to recover his or her proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery for him or her.
8. **Corporations: Actions: Parties: Proof.** To state a claim for a separate and distinct injury, the shareholder must allege and prove injury separate and distinct from injury suffered by other shareholders, not injury separate and distinct from injury suffered by the corporation.
9. **Corporations: Stock.** As a general rule, diminution in the value of stock is a direct injury to the corporation and only an indirect or incidental injury to an individual shareholder.
10. **Corporations: Actions: Parties.** Even though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, generally a shareholder cannot sue individually concerning rights which belong to the corporation.
11. _____: _____: _____. If an injury to a shareholder resulted from the violation of some special duty owed by the wrongdoer to the shareholder, then the shareholder may bring an individual action.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Michael L. Schleich and Amy S. Bones, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Maureen E. McGrath and Jeff A. Anderson, of Kutak Rock & Campbell, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

The plaintiffs, shareholders of World Radio Laboratories, Inc., have appealed from orders of the district court which dismissed their amended petitions following the sustaining of defendant's demurrers. Plaintiffs' actions were based on the alleged negligence of the defendant in its capacity as a firm of certified public accountants in rendering improper and

inaccurate examinations of various financial statements issued by World Radio. They sought the recovery of damages to them, as shareholders, allegedly separate and distinct from those damages suffered by the corporation itself. The three cases have been consolidated for briefing and argument.

In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader. *S.I.D. No. 272 v. Marquardt, ante* p. 39, 443 N.W.2d 877 (1989); *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989); *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989).

In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *S.I.D. No. 272 v. Marquardt, supra.*

The plaintiffs' assignments of error are that the trial court was incorrect in failing to find that the plaintiffs, as shareholders, possessed a cause of action for their own particular injuries separate and distinct from those of the corporation and that if the demurrers were sustained on the basis of the statute of limitations, such actions were improper because the allegations of the amended petitions relate back to the time of the filing of the original petitions.

Plaintiffs' original petitions alleged the collective ownership of something in excess of 90 percent of the capital stock of World Radio; that World Radio for all fiscal years since 1970 had annually engaged the defendant, Coopers & Lybrand, to examine the financial statements of World Radio and to study and evaluate World Radio's system of internal accounting controls; that Coopers did perform such examinations and rendered such opinions to World Radio for each fiscal year up to and including the one ending June 2, 1984; that such reports certified that the financial statements examined presented fairly the consolidated financial position of World Radio; and that Coopers failed to properly perform and performed negligently its obligations with respect to all annual examinations. The petitions further alleged that as a result of such negligence, World Radio is unable to obtain or raise equity

capital for expansion purposes, is unable to expand existing credit lines, has lost revenues, and has incurred expenses it would not otherwise have had; that World Radio's stockholders' equity and the value of World Radio's business is less than it would otherwise have been; and that World Radio has inadequate capital to operate. The petitions also alleged that as a natural consequence of Coopers' negligence, the equity of plaintiffs' stock has been reduced, the value of their stock has been reduced, and the plaintiffs have been unable to sell their World Radio stock in a public equity offering or to obtain stock in another entity as a result of a merger or consolidation.

Coopers demurred on the grounds that the facts did not state a cause of action, the plaintiffs had no legal capacity to sue, and there was a defect in parties plaintiff. The demurrers were sustained, and plaintiffs filed amended petitions.

The amended petitions alleged the same facts except that added to those petitions were allegations that the written opinions were furnished to World Radio and plaintiffs, that the written opinions furnished by Coopers were certified to plaintiffs, that the written opinions were delivered by Coopers to World Radio and plaintiffs, and that Coopers knew that plaintiffs were relying on the written opinions to offer the stock they owned in World Radio for sale in a public equity offering and, further, that Coopers knew and advised plaintiffs that plaintiffs would be able to sell their World Radio stock for a price in excess of its actual book value.

The amended petitions concluded with allegations that the equity of plaintiffs' stock has been reduced, the value of such stock has been reduced, plaintiffs "have been unable to sell their World Radio stock in a public equity offering" or to obtain stock in another entity as a result of a merger and have thus been prevented from realizing any amount in excess of the actual book value of the stock, and plaintiffs have lost the opportunity to receive dividends from World Radio.

Coopers again demurred on the same grounds as before and on the additional ground that the causes of action stated, if any, are barred by the statute of limitations.

The trial court gave no reason for its acts of sustaining the

demurrers. This makes it somewhat difficult to identify and analyze the question presented. This court, in *Clyde v. Buchfinck*, 198 Neb. 586, 594, 254 N.W.2d 393, 397-98 (1977) (citing with approval *In re Linford's Estate, Linford v. Linford et al.*, 116 Utah 21, 207 P.2d 1033 (1949)), stated: " 'When a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained; otherwise, this court is not informed in regards wherein the complaint was deficient. . . .' "

The apparent ground upon which the demurrers were sustained, and the question argued most strenuously by the parties, is the claimed derivative nature of the action.

As a general rule a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation. See, *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988); *Henderson v. Joplin*, 191 Neb. 827, 217 N.W.2d 920 (1974); *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954).

There is a well-recognized exception to the general rule: If the shareholder properly establishes an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, rather than as a shareholder, such individual action may be maintained. See, *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881 (Iowa 1983); *W. Clay Jackson Enterprises v. Greyhound Leasing*, 463 F. Supp. 666 (D.P.R. 1979); 12B W. Fletcher, Cyclopedia of the Law of Private Corporations § 5911 (rev. perm. ed. 1984); 19 Am. Jur. 2d *Corporations* § 2249 (1986).

The courts generally are in agreement that to come within this exception, the shareholder must demonstrate that there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder or that the shareholder suffered an injury separate and distinct from that suffered by other shareholders. See 12B W. Fletcher, *supra*; *Cunningham v. Kartridg Pak Co.*, *supra*; *W. Clay Jackson Enterprises v. Greyhound Leasing*,

supra (separate injury); *E. K. Buck Retail Stores v. Harkert, supra* (separate and distinct injury); 19 Am. Jur. 2d, *supra* (special duty).

This exception is now recognized in Nebraska. In *Wells Fargo Ag Credit Corp. v. Batterman, supra* at 20, 424 N.W.2d at 874, this court said:

> There are exceptions to the rule precluding actions by shareholders, as individuals, where the cause of action belongs to the corporation, such as a situation where a shareholder's loss is separate and distinct from that of other shareholders of the corporation or where there may be a special duty owed by a wrongdoer to a shareholder.

Plaintiffs argue that the actions are not derivative but, rather, are individual claims seeking redress for direct injury. According to plaintiffs, they satisfy both of the exceptions to the general rule prohibiting suit by a shareholder for injury to the corporation and thus may bring individual actions.

SEPARATE AND DISTINCT INJURY

It is only where the injury to the plaintiff's stock is peculiar to him or her alone, such as in an action based on a contract to which the shareholder is a party, on a right belonging to him or her, or on a fraud affecting him or her directly, and does not fall alike upon other shareholders, that the shareholder may recover as an individual. See 12B W. Fletcher, *supra*, §§ 5911 and 5913.

This court, in *E. K. Buck Retail Stores v. Harkert, supra*, made it clear that a shareholder may sue personally when he or she has sustained a loss separate and distinct from that of other shareholders. When a shareholder fails to assert a claim peculiarly his or her own as distinguished from other shareholders, to allow the shareholder to sue personally would authorize a suit by each shareholder and result in a multiplicity of suits. As explained by the court:

> When the injury is to the collective rights of stockholders and the corporate property has been augmented by restitution, the plaintiffs, who have suffered as one of these, will be fully indemnified. If a stockholder is permitted to bring an action personally to recover his

> proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery for him.

Id. at 900, 62 N.W.2d at 307.

Plaintiffs argue that they did suffer injury separate and distinct from that suffered by World Radio as a corporate entity. However, to state claims entitling them to bring individual actions, plaintiffs must allege injury separate and distinct from injury suffered by other shareholders, not injury separate and distinct from injury suffered by the corporation. A review of the allegations of the amended petitions reveals that the injuries are not separate and distinct from injuries suffered by the corporation or other shareholders.

It is alleged that plaintiffs were damaged in the following particulars: (1) The equity of their stock has been reduced; (2) the value of their stock has been reduced; (3) they have been unable to sell their stock in a public equity offering or to obtain stock in another entity through merger or consolidation and have thus been prevented from realizing any amount in excess of the actual book value of their stock; and (4) they lost the opportunity to receive dividends from World Radio.

The allegation of damage to the equity of plaintiffs' stock is essentially the same as one of their allegations of damage to World Radio, i.e., "World Radio's stockholders' equity . . . is less than it would otherwise have been."

As for plaintiffs' allegation that the value of their stock has been reduced, diminution in the value of the stock is a direct injury to the corporation and only an indirect or incidental injury to an individual shareholder. See, *W. Clay Jackson Enterprises v. Greyhound Leasing*, 463 F. Supp. 666 (D.P.R. 1979); *Brictson v. Woodrough*, 164 F.2d 107 (8th Cir. 1947), *cert. denied* 334 U.S. 849, 68 S. Ct. 1500, 92 L. Ed. 1772 (1948); 12B W. Fletcher, Cyclopedia of the Law of Private Corporations § 5913 (rev. perm. ed. 1984); 19 Am. Jur. 2d *Corporations* § 2246 (1986). As noted by the court in *W. Clay Jackson Enterprises v. Greyhound Leasing, supra* at 671:

> The diminution in value of a stockholder's investment is a concomitant of the corporate injuries resulting in lost

> profits. *A fortiori*, any redress obtained by the corporations would run to the benefit of their stockholders, and to permit the latter to proceed with those claims would permit a double recovery.

Plaintiffs allege that they were damaged in that they "have been unable to sell their . . . stock in a public equity offering" and thus "have been prevented from realizing any amount in excess of the actual book value of said stock." Plaintiffs argue that they are not seeking redress for misappropriation of corporate assets or property or for any injury to the corporation but, rather, are seeking individual damages because, as a result of defendant's alleged negligence, they were unable to consummate their plan to sell their stock in a public equity offering. This reasoning is impossible to follow given that a public equity offering is an offering by the corporation of newly issued stock in exchange for new capital invested in the corporation. A public equity offering is not a sale of existing and already issued stock in the possession of shareholders.

The final allegation of damage is the lost opportunity to receive dividends from World Radio. Such injury would not be peculiar to plaintiffs, but would be suffered by all shareholders of the corporation.

Even though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation. *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988); 12B W. Fletcher, *supra*, § 5910. All of plaintiffs' alleged damages are derivative from the alleged corporate injury and, by their very nature, would necessarily have been sustained by all of the shareholders of World Radio. Plaintiffs have no separate and distinct injury upon which to base individual actions.

SPECIAL DUTY

If the injury to the shareholder resulted from the violation of some special duty owed by the wrongdoer to the shareholder, then the shareholder may bring an individual action. *Wells Fargo Ag Credit Corp. v. Batterman, supra*; *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881 (Iowa 1983); 12B W.

Fletcher, *supra*, § 5911; 19 Am. Jur. 2d, *supra*, § 2249.

Plaintiffs contend that Coopers owed them a duty to see that the World Radio financial statements fairly represented the consolidated financial conditions of World Radio. In support of their contention, plaintiffs cite *Rosenblum v. Adler*, 93 N.J. 324, 461 A.2d 138 (1983), as authority for a special duty certified public accountants owe shareholders, which duty is separate from any duty the accountant might owe the corporation being audited. Plaintiffs simply misinterpret the gist of their extensive citation from the case. The point of the court's indepth analysis of the function of an accountant is that an accountant auditing a corporation owes an obligation of fairness not only to management but to the shareholders as well. This obligation, however, does not rise to the level of a special duty owed directly to the shareholders, the breach of which would allow each shareholder to sue as an individual. To go that far would allow the multiplicity of suits the rule against individual suits by shareholders seeks to avoid.

Nevertheless, plaintiffs allege that Coopers was rendering advice to World Radio and plaintiffs with respect to a public equity offering and in relation thereto advised plaintiffs that they would be able to sell their stock at a price in excess of its actual book value. Construing the amended petitions liberally and taking this fact as true for the purpose of demurrer, we will assume that plaintiffs have alleged conduct on the part of Coopers outside the scope of the auditing contracts, for which conduct Coopers owed plaintiffs a direct duty of care.

Based on that assumption, Coopers owed plaintiffs a special duty separate from the duty Coopers owed to the corporation. However, plaintiffs failed to allege sufficient facts to state individual causes of action against Coopers; i.e., plaintiffs neglected to allege any facts establishing that they acted affirmatively in reliance on Coopers' advice and were thereby damaged. Rather, their allegations amounted to mere conclusions.

Plaintiffs in their amended petitions made no allegations that any public offering was actually made or that any actual agreement for merger or consolidation fell through as a result of any negligent advice rendered to plaintiffs or as a result of the

alleged inaccuracies in World Radio's financial statements. Without an allegation of any affirmative acts taken in reliance on the audited financial statements or Coopers' advice, plaintiffs have stated only that the value of their stock has been reduced and they have lost the opportunity to receive dividends, which, as stated, are no more than derivative claims.

Since the amended petitions fail to establish injury to the plaintiffs separate and distinct from that suffered by other shareholders or a special duty owed directly to plaintiffs by Coopers, the trial court did not err in sustaining the demurrers because plaintiffs failed to state causes of actions.

It is unnecessary for us to consider any alleged error regarding the statute of limitations. The judgments of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN W. NEARHOOD, APPELLANT.

448 N.W.2d 399

Filed November 17, 1989. No. 88-874.

1. **Postconviction.** An evidential hearing may be denied a movant for postconviction relief when the records and files in the case affirmatively establish that the movant is not entitled to relief.
2. _____. One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable.
3. _____. A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required when (1) the motion does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.

4. **Postconviction: Proof.** One seeking postconviction relief has the burden of establishing a basis for such relief.
5. **Postconviction.** A movant is not entitled to postconviction relief merely on his or her own bald assertions or because he or she believes that he or she did not enjoy a perfect trial.
6. _____. A conviction will not be set aside in the absence of a showing of actual prejudice.
7. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
8. **Postconviction: Effectiveness of Counsel: Proof.** When a postconviction movant alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the movant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area; further, the movant must make a showing of how he or she was prejudiced in the defense of the case as a result of his or her attorney's actions or inactions.
9. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution or article I, § 11, of the Nebraska Constitution, and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
10. **Convictions: Right to Counsel: Appeal and Error.** Absent a showing of prejudice in the trial court's appointment of counsel on the defendant's behalf, a criminal conviction will not be reversed.
11. **Sentences: Evidence: Appeal and Error.** The mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.
12. **Criminal Law: Constitutional Law: Trial.** A defendant is not constitutionally entitled to receive a perfect trial, only a fair and constitutional trial.

Appeal from the District Court for Hitchcock County: JACK H. HENDRIX, Judge. Affirmed.

Lance C. Antonson, of Hines & Hines Lawyers, for appellant.

Robert M. Spire, Attorney General, and Melanie J. Whittamore for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Defendant, Steven W. Nearhood, appeals from the denial of his motion for relief pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). He asserts, in summary, that the postconviction court erred in (1) failing to grant him an evidential hearing on those allegations within his motion which do not relate to his claimed ineffectiveness of counsel and (2) overruling his motion for postconviction relief. We affirm.

On June 10, 1985, Nearhood, pursuant to a plea agreement, pled guilty to conspiracy to commit escape. He later moved to withdraw his plea, but the trial court, after hearing, denied the motion. Nearhood was then sentenced to imprisonment for a period of 5 to 10 years. In his direct appeal to this court, Nearhood asserted that the trial court erred in not allowing him to withdraw his guilty plea and that the sentence imposed was excessive. This court affirmed the trial court's judgment. *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986) (*Nearhood I*).

On September 16, 1987, Nearhood filed the motion which is now before us. He alleges therein that (1) the bill of exceptions is inaccurate, thereby depriving him of the right to appeal guaranteed by article I, § 23, of the Nebraska Constitution; (2) the presentence report received by the trial court was biased and contained uncorrected errors, by reason of which he was denied the due process guaranteed by article I, § 3, of the Nebraska Constitution and the 5th, 6th, and 14th amendments to the U.S. Constitution; (3) the omission from the bill of exceptions of counsels' closing remarks and the trial court's statements in imposing sentencing violates article I, §§ 3 and 11, of the Nebraska Constitution and the 5th, 6th, and 14th amendments; and (4) he did not receive effective assistance of counsel at the trial level in violation of article I, § 11, of the Nebraska Constitution (guaranteeing an accused the right to defend by counsel) and the 6th amendment to the U.S. Constitution as made applicable to the several states by the 14th amendment.

The postconviction court ordered an evidential hearing with respect to Nearhood's allegation that he had not been provided effective assistance of counsel, but denied Nearhood a hearing

on the first, second, and third allegations set forth above.

The record establishes that the information charging Nearhood with conspiracy to escape was irregular in that the heading of the information indicated that Nearhood had been charged with a "Class III Felony," but the body of the information described a Class IV felony. At Nearhood's arraignment, the trial court suggested that the county attorney amend the information by interlineation so that the body of the information would conform with the heading and reflect the true situation, that a Class III felony was being charged. Nearhood's then trial attorney, hereinafter referred to as Nearhood's initial attorney, did not object to this amendment. According to the initial attorney, the amendment to the information was consistent with the plea agreement contemplated by the parties. However, according to Nearhood, the amendment was not consistent with such plea agreement.

Nearhood subsequently sought to withdraw his guilty plea, and his initial attorney withdrew from representing him. The trial court then appointed a second attorney, who represented Nearhood during the hearing on Nearhood's motion to withdraw his guilty plea, the sentencing hearing, and the subsequent direct appeal to this court which is the subject of *Nearhood I*.

We begin our analysis by recalling certain well-established applicable principles. The first among these is that an evidential hearing may be denied a movant for postconviction relief when the records and files in the case affirmatively establish that the movant is not entitled to relief. *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989); *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988).

Furthermore, in a proceeding under the act the movant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable. *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988). A court is not required to grant an evidential hearing on a motion which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction

Act when (1) the motion does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights, causing the judgment against the movant to be void or voidable. *Id.*

One seeking postconviction relief has the burden of establishing a basis for such relief. *State v. Kern, supra*; *State v. Luna, supra*; *State v. Cole*, 224 Neb. 10, 395 N.W.2d 532 (1986); *State v. Landers*, 212 Neb. 48, 321 N.W.2d 418 (1982). A movant is not entitled to postconviction relief merely on his or her own bald assertions or because he or she believes that he or she did not enjoy a perfect trial. *State v. Landers, supra.* Thus, a conviction will not be set aside in the absence of a showing of actual prejudice. *State v. Cole, supra.*

The short and dispositive answer to Nearhood's first summarized assignment of error, which, as noted earlier, challenges the postconviction court's denial of an evidential hearing on his first, second, and third alleged grounds for relief, is that those grounds present issues which could have been raised in the direct appeal to this court. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Kern, supra*; *State v. Ferrell*, 230 Neb. 958, 434 N.W.2d 331 (1989). See, also, *State v. Bostwick, ante* p. 57, 443 N.W.2d 885 (1989).

In any event, as the discussion which follows demonstrates, the grounds on which postconviction relief is claimed are without merit. Nearhood's first ground for postconviction relief asserts that the bill of exceptions from the original proceeding is inaccurate in that lines 1 through 8 of the first page "are from a previous proceeding" and that "certain testimony has been deleted." However, Nearhood does not indicate what testimony may have been deleted, nor does he tell us how the alleged inaccuracy may have affected his conviction. The eight lines he claims are from a different proceeding

basically consist of the trial court's asking the attorneys if they were ready to proceed; any alleged inaccuracy within this portion of the bill of exceptions obviously had no bearing on Nearhood's conviction.

In setting forth his second ground for relief, Nearhood contends that "it was prejudicial error . . . to allow the entry into evidence of the defendant's pre-sentence investigation containing, as it did, all the mistakes, error and bias, and especially when they were not corrected." However, Nearhood had the opportunity, at his sentencing hearing, to testify in detail about the presentence report, and even more importantly, the sentence imposed by the trial court is amply supported by the record, even if those portions of the presentence report to which Nearhood objects are excluded from consideration. The nonexcessiveness of his sentences is a matter specifically ruled upon in *Nearhood I.*

Nearhood argues as his third ground for postconviction relief that his constitutional rights were violated as the result of omitting from the bill of exceptions counsels' closing arguments and the trial court's statements during sentencing. While it is true that these portions of the trial and sentencing hearing were omitted from the bill of exceptions, apparently because no record was made, there is no showing the omissions prejudiced Nearhood in such a way that would render his conviction void or voidable.

The postconviction court was therefore entirely correct in denying Nearhood an evidential hearing on his first, second, and third asserted grounds for relief. The first summarized assignment of error is therefore without merit.

Remaining for consideration, then, is the second summarized assignment of error, which challenges the representation afforded him by both his initial and second attorneys. In that connection we point out that inasmuch as his second attorney had been appointed before *Nearhood I* was filed, the alleged ineffectiveness of his initial attorney is an issue which could have been raised in that direct appeal. Thus, in order for us to reach the issue of the initial attorney's ineffectiveness, we construe Nearhood's claim to be that his second attorney was ineffective in failing to raise this issue on

direct appeal.

When a postconviction movant alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the movant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the movant must make a showing of how he or she was prejudiced in the defense of the case as a result of his or her attorney's actions or inactions. *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Grell, ante* p. 314, 444 N.W.2d 911 (1989); *State v. Bostwick, ante* p. 57, 443 N.W.2d 885 (1989); *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989); *State v. Ditter, supra*; *State v. Gagliano, supra*. We find nothing in article I, § 11, of the Nebraska Constitution which requires more.

With respect to the alleged ineffectiveness of his initial attorney, Nearhood charges that the attorney failed to (1) adequately consult with him, (2) advise him of the nature and consequences of his plea, and (3) investigate possible defenses available to Nearhood. However, while these allegations may be supported to some extent by Nearhood's deposition testimony, they are contradicted by the initial attorney's testimony at the postconviction hearing. Furthermore, at his arraignment, Nearhood discussed the factual basis of the amended charge against him, and the trial court explained the consequences of the guilty plea. Nearhood then stated he understood the charge and the penalties associated with it.

Nearhood also alleges that his initial attorney failed to turn over his entire case file to the second attorney. Assuming, but not deciding, the truth of this allegation, the fact remains that

Nearhood fails to show a reasonable probability that he may have been prejudiced by this failure.

Although the issue is not specified as a ground for relief in Nearhood's motion for postconviction relief, he also argues that his initial attorney's representation was ineffective in that he permitted the county attorney to amend the information by interlineation. Nearhood testified, and argues in his brief, that he thought he was pleading guilty to a Class IV rather than a Class III felony. Thus, Nearhood contends that his initial attorney should have objected to the court's allowing the information to be amended. However, that attorney's testimony from the postconviction hearing, along with a review of the record of the arraignment, refutes the contention that Nearhood believed he was pleading to a Class IV rather than a Class III felony.

In addition, Nearhood complains that his initial attorney failed to object to proceeding on the amended information immediately after the amendment was made. It is true that Neb. Rev. Stat. § 29-1604 (Reissue 1985) makes the provisions of Neb. Rev. Stat. § 29-1802 (Reissue 1985), dealing with indictments, applicable to informations. Section 29-1802 provides in relevant part that no one "shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy" of the indictment. It is also true that said time requirement applies to informations which have been amended. *McKay v. State*, 91 Neb. 281, 135 N.W. 1024 (1912), *modifying* 90 Neb. 63, 132 N.W. 741 (1911). However, not only does Nearhood not tell us how he was prejudiced by this failure, but the right is merely a statutory one, not one of the constitutional magnitude required for postconviction relief.

With respect to his second attorney's representation, Nearhood first argues that that attorney did not adequately consult with him prior to the motion to withdraw his guilty plea and that, thus, the second attorney was not adequately prepared to proceed on this motion. This contention is refuted by the second attorney's testimony at the postconviction hearing; moreover, the record does not support a claim that

Nearhood was in any way prejudiced by any alleged lack of preparation by appellate counsel.

Nearhood next argues that the second attorney was ineffective in failing to "bring out, in its entirety, defendant's reasons for his change of plea, i. e., coersion [sic] and both mental and physical harassment inflicted by the sheriff and by the chief deputy, prior to the defendant's entry of his plea of guilty . . . ." However, this court specifically addressed and decided this issue adversely to him in *Nearhood I*.

Nearhood also argues that his second attorney failed to raise on direct appeal "all viable issues which were a proper subject for appeal . . . ." Particularly, Nearhood first contends that the second attorney should have assigned as error the trial court's decision to appoint second counsel as opposed to allowing Nearhood to proceed pro se. However, Nearhood fails to provide any indication of how he was prejudiced by the appointment of counsel on his behalf. This court has held that absent a showing of such prejudice, a criminal conviction will not be reversed. (See *State v. Kirby*, 198 Neb. 646, 254 N.W.2d 424 (1977), in which this court determined that the defendant was not prejudiced either by being represented by counsel or by the trial court's denial of self-representation.) Furthermore, except for Nearhood's deposition testimony, the record fails to show that Nearhood ever objected to the person appointed as his second attorney. In fact, the record reveals that Nearhood attempted to contact his second attorney regarding his case immediately after he learned that the attorney had been appointed as his counsel. Thus, it cannot be said that the second attorney was ineffective in not raising this issue on appeal.

Nearhood further complains that his second attorney was ineffective in failing to raise on direct appeal the issue of the disparity between the sentences imposed on him and the coperpetrator in the case. However, the mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). Thus, this

was not a viable issue on appeal.

Finally, Nearhood argues that the second attorney was ineffective in failing to address on direct appeal the purported errors and bias in the presentence report. This is the same issue raised by Nearhood's second stated ground for postconviction relief, an issue on which the postconviction court refused to grant an evidential hearing. As previously discussed, this issue does not provide a basis for finding reversible error. Consequently, the second attorney's failure to raise this issue on direct appeal does not represent a sound basis for finding that Nearhood did not receive effective assistance of counsel.

It must be remembered that "[a] defendant is not constitutionally entitled to receive a 'perfect trial,' only a fair and constitutional trial." *State v. Hochstein*, 216 Neb. 515, 519, 344 N.W.2d 469, 472 (1984), *cert. denied* 469 U.S. 873, 105 S. Ct. 226, 83 L. Ed. 2d 156. The postconviction court held an evidential hearing with respect to Nearhood's claim of ineffective assistance of counsel and determined that Nearhood was not entitled to postconviction relief. It cannot be said that this determination was clearly erroneous.

There being no merit to Nearhood's summarized assignments of error, the judgment of the postconviction court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL L. BATTS, APPELLANT.

448 N.W.2d 136

Filed November 17, 1989. No. 88-875.

1. **Drunk Driving: Words and Phrases.** As used in Neb. Rev. Stat. § 39-669.07 (Reissue 1988), the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
2. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact.
4. **Police Officers and Sheriffs: Drunk Driving: Proof.** A police officer's opinion testimony, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol.
5. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt.
6. **Circumstantial Evidence.** In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

After a bench trial, the defendant-appellant, Paul L. Batts, was adjudged guilty of motor vehicle homicide by driving while intoxicated in violation of Neb. Rev. Stat. § 28-306 (Reissue 1985). Batts urges that the evidence is insufficient to sustain his conviction. We affirm.

The charge against Batts resulted from a collision between an automobile he was driving and in which the decedent, John A. Hurst, was riding and an automobile driven by April Dickert-Heisch. The collision took place at 4:17 during the afternoon of February 10, 1988, on Ridgewood Avenue, near the point at which it branches into a Y intersection with 84th Street in Omaha, Nebraska, as more fully described later in this opinion. Although it had snowed the night before the collision, the lanes of travel on Ridgewood Avenue were clear and dry; however, there was snow along the curbs and in the middle of the street. There was also testimony that Ridgewood Avenue

was wet and icy in spots and that the street was snowpacked at the intersection.

Earlier that day, Batts had borrowed the automobile he was driving from its owner, Michelle Shipman. Shipman had informed Batts that the automobile had mechanical problems, specifically that it unpredictably "kind of stalled out a little bit once in a while . . . ." She told him to accelerate when the automobile began to hesitate in order to prevent it from stalling.

Later during the day, Batts and two friends, Brian Caccavari and Paul Anderson, went to Caccavari's house after school. While there, Caccavari got a bottle of whiskey and one of rum from his bedroom. The evidence concerning the amount of alcohol Batts consumed and when he did so is in conflict.

According to Caccavari, Batts first drank one or two "glugs" directly from each of the bottles at about 3:15 p.m. Then Batts and Anderson went to a convenience store to get some Dr. Pepper to mix with the liquor. After they returned to Caccavari's house at about 3:20 or 3:25 p.m., Batts consumed a mixed drink from a 12-ounce paper Coca-Cola cup. To mix the drink, Batts filled the cup half full with liquor and then added Dr. Pepper. Batts then made another mixed drink of similar proportions, which he drank while the three returned to their school. Before leaving the school grounds, Batts had made another mixed drink, again containing, according to Caccavari, half alcohol and half Dr. Pepper, which Batts drank as he drove.

According to Anderson, at about 3:25 p.m. Batts drank two "slam dunks," consisting of mostly whiskey and some Dr. Pepper, from a paper Coca-Cola cup, and then drank a third drink of half whiskey and half Dr. Pepper.

According to Batts' testimony at trial, he drank no alcohol until after he returned to Caccavari's house from the convenience store and after having eaten a hoagie sandwich at about 2:45 p.m. He testified that he took his first drink of the day at 3:45 p.m., at which time he drank two 1-ounce shots of the 80-proof alcohol Caccavari had produced. He then drank two "slam dunks," one at 3:50 p.m. and one at 3:55 p.m., each consisting of 1 ounce of alcohol and 1 ounce of Dr. Pepper. Just before returning to the school building, he mixed another drink

containing 2 ounces of whiskey to take with him. He finished that drink at the school grounds at around 4:05 p.m. and then made another, again containing 2 ounces of whiskey, which he had with him at the time of the collision and from which he took two sips. Batts testified that as a result of the collision, the drink he had between his legs spilled "all over" his clothing.

In contrast with his above testimony, after Batts was arrested, he told police during a taped statement that he began drinking before going to the convenience store. He stated that after the schoolday, Caccavari said, "[L]et's go to my house and drink a little bit before we go. I said, alright. We went to his house, did about two shots, probably at the most . . . two shots . . . and [Anderson] wanted me to take him up to the store to get him a 2 liter Dr. Pepper."

According to Caccavari, somewhere between 3:40 and 3:55 p.m., Batts drove him and Anderson to the school in Shipman's automobile in order to pick up another friend, the decedent. They took both bottles of alcohol and several paper Coca-Cola cups with them. After finding the decedent in the school building, the four returned to Shipman's automobile and left, with Batts driving.

Caccavari was in the front passenger seat, and Anderson and the decedent were sitting in the back seat. Eventually, Batts made a left turn onto Ridgewood Avenue and began traveling north. The speed limit for northbound traffic on Ridgewood Avenue is 30 miles per hour. According to Batts, the automobile was proceeding at 30 miles per hour as he traveled on Ridgewood Avenue.

From the point at which Batts entered Ridgewood Avenue, the street proceeds north for about two blocks, then curves to the northwest for about a block, and then progresses northwesterly for about two blocks until reaching a Y intersection, where the street divides into two branches. One branch continues to the northwest and becomes 84th Street; the other branch retains the name Ridgewood Avenue and proceeds northeast.

As the automobile in which the four rode approached the location of the collision near the Y intersection, Caccavari asked Batts if "he could drive good when he was drunk," to

which Batts responded affirmatively. Anderson testified that as they approached the Y intersection, he saw Batts push on the accelerator and was pushed back against the seat from the impact of the automobile going forward. He told Batts, "[D]on't do that." According to Caccavari, just as they approached the Y intersection, the automobile accelerated suddenly and began fishtailing. "We were going down the street and we fishtailed towards this way, and we missed the first car that was coming, we fishtailed back that way and then we fishtailed that way again, and that's when we got smashed on the driver's side."

Dickert-Heisch, who was traveling south on 84th Street, testified that she "saw a car coming north on 84th and it was swerving, fishtailing into — it looked like it was going into my lane of traffic, and the car immediately preceding mine had just barely missed that car . . . ." Although Dickert-Heisch slowed down, there was nowhere for her to turn off the street, and the side of the fishtailing automobile struck the front end of her automobile.

A police officer for the city of Omaha, an expert in reconstructing accidents, concluded, based on the "skid marks," "yaw marks," "rotation marks," the debris located at the collision scene, the damage to the vehicles, and interviews with witnesses to the collision, that the northbound automobile driven by Batts left its lane of traffic, collided with Dickert-Heisch's southbound automobile, pushed it backward several feet, and then "rotated," during which "there was a second collision to the rear of [Dickert-Heisch's automobile] . . . ."

After the collision, Caccavari hid the two bottles of alcohol behind some bushes close to the site of the collision. Police found the bottles behind the bushes after the accident and also found lying on the floorboard of the driver's side of the automobile Batts had been driving a paper Coca-Cola cup which contained a liquid smelling like alcohol.

Batts denied at trial that he was drunk at the time of the collision. However, an Omaha police officer who investigated the scene of the accident detected the odor of alcohol on Batts' breath and noticed that Batts' eyes were red and bloodshot.

After Batts had been taken to the emergency room, another officer noticed that Batts smelled of alcohol, was talkative, and had bloodshot eyes. Based on those circumstances and Batts' demeanor, the second officer concluded that Batts had been driving while under the influence of alcohol and placed him under arrest. At one point in his interviews with the police, Batts admitted that he felt "sort of light-headed" while driving.

A sample of Batts' blood taken at 5:25 p.m. revealed Batts had a concentration of .13 grams of alcohol per hundred milliliters of blood. Considering the standard deviation, according to the chemist who testified for the State, Batts' blood-alcohol level could range from .117 to .143 grams of alcohol per hundred milliliters of blood.

A pathologist called by Batts testified that a reasonably small amount of alcohol will be absorbed into the blood in about 1 hour, that half the alcohol consumed at any time will be absorbed in about 15 to 20 minutes, and that food, especially that with a high fat content, "definitely delays absorption." He opined that if Batts drank nothing before 3:45, had eaten a hoagie sandwich earlier, then at 3:45 drank 4 ounces of 80-proof whiskey, at 3:50 drank another 2 ounces of 80-proof whiskey, between 3:55 and 4:05 drank another 2 ounces of 80-proof whiskey, and finally, at 4:05 mixed another drink with 2 ounces of whiskey, from which he took two swallows, Batts would have approximately an .08 blood-alcohol content at 4:15. However, on cross-examination, the pathologist testified that if it were assumed Batts started drinking at 3:15 rather than 3:45, his blood-alcohol content would be closer to .10 at 4:15.

En route to the hospital, Batts told a paramedic: "I was going too fast, I was showing off, I lost it in the curve, and, boy, I was just being stupid." Later, in the emergency room before being placed under arrest, Batts declared that he "drove the car too fast around the curve and he lost control of the car" and that he "had perfect control of the vehicle until he went around the corner and that he lost control of the vehicle and he was showing off."

During his taped statement to the police, Batts stated, "I was coming around a slow corner, kind of like when the street just curves, the car started to cut off, so I gave it a little gas, the rear

end went into a spin and that's all I can remember." At trial, Batts' explanation of the collision coincided with this taped statement. Batts believed that the collision was caused when the automobile he was driving hesitated, causing him to accelerate and lose control of it.

Both the State and Batts introduced testimony from mechanics who had examined the automobile Batts had been driving at the time of the collision. The State's mechanic opined that from a stopped position to low speeds the automobile was capable of "stumbling," hesitating between the time when the accelerator is depressed and the time when the automobile actually accelerates. The mechanic who testified for Batts opined that as a result of several mechanical problems the automobile had, there was a possibility that the automobile could hesitate at speeds of 0 to 30 miles per hour. Neither the State's nor Batts' expert mechanics discovered a defect which would cause the automobile to accelerate by itself, both agreeing that the acceleration pedal would have to be physically depressed for the vehicle to accelerate.

The parties stipulated that decedent's death was the result of head and internal injuries he suffered as a result of the collision.

Section 28-306 provides:

> (1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.
>
> . . . .
>
> (3) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 39-669.01, 39-669.03, or 39-669.07, motor vehicle homicide is a Class IV felony.

Neb. Rev. Stat. § 39-669.07 (Reissue 1988) provides in pertinent part:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (1) While under the influence of alcoholic liquor or of any drug;
>
> (2) When such person has a concentration of

ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood.

As used in § 39-669.07, the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner. *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987).

In order to convict Batts of felony motor vehicle homicide, the State was required to prove that Batts' driving in violation of § 39-669.07 proximately caused the death of the victim. See *State v. Ring, ante* p. 720, 447 N.W.2d 908 (1989).

To begin our discussion of Batts' assignment of error, we note that a verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Johns, ante* p. 477, 445 N.W.2d 914 (1989). In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. *State v. Boham, ante* p. 679, 447 N.W.2d 485 (1989).

The record contains evidence sufficient to support the district court's judgment. A police officer concluded, based on Batts' demeanor and the fact that Batts was talkative, his breath smelled of alcohol, and he had bloodshot eyes, that Batts had been driving while under the influence of alcohol. A police officer's opinion testimony, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol. *State v. Thomte, supra.*

Furthermore, the blood test revealed that at 5:25 p.m., just over an hour after the collision, Batts had a concentration of .13 grams of alcohol per hundred milliliters of blood. Although Batts' expert pathologist opined that assuming Batts drank the amounts and at the times he testified to, he would have had only a concentration of .08 grams of alcohol per hundred milliliters of blood at the time of the collision, the pathologist also

testified that if Batts had begun his drinking at 3:15 rather than 3:45, his blood-alcohol content would be closer to .10 at 4:15. Caccavari testified that Batts began drinking at 3:15, and in his taped statement Batts stated that he drank about two shots of liquor before going to the convenience store. Additionally, the pathologist's opinion assumes that Batts drank the amount he had testified to drinking. From Caccavari's testimony it can reasonably be concluded that Batts drank twice the amount he admitted in his testimony.

Finally, Batts stated that he felt lightheaded and that as he drove around the curve along Ridgewood Avenue, he was traveling too fast and was showing off and as a result lost control of his automobile. Both Caccavari and Anderson testified that Batts accelerated immediately prior to the collision and then began fishtailing out of control until colliding with Dickert-Heisch's automobile. Although there was evidence that the automobile Batts was driving was malfunctioning and that the street surface was slippery, the district court could have reasonably concluded that Batts lost control of his automobile as the result of being under the influence of alcohol and thus proximately caused decedent's death. Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt. See *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989); *State v. Salas*, 231 Neb. 471, 436 N.W.2d 547 (1989). In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt. See *State v. Blue Bird, supra*; *State v. Salas, supra*.

The record failing to sustain Batts' assignment of error, we affirm the judgment of the district court.

AFFIRMED.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS, SUCCESSOR IN INTEREST TO NORFOLK PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. PHILIP G. SCHMER, APPELLANT, AND DORIS M. SCHMER, APPELLEE.

448 N.W.2d 141

Filed November 17, 1989. No. 88-995.

1. **Foreclosure: Appeal and Error.** When a defendant requests a stay of sale pursuant to Neb. Rev. Stat. § 25-1506 (Reissue 1985), that request precludes that defendant from appealing from the foreclosure decree.
2. **Foreclosure: Waiver: Appeal and Error.** A request for a stay of sale is a waiver of any *prior* error in the proceedings.
3. **Jurisdiction.** The question of subject matter jurisdiction can be raised at any time in the proceedings.
4. **Supersedeas Bonds: Judgments: Final Orders: Appeal and Error.** An appeal to the Supreme Court does not operate as a stay of proceedings unless an appellant supersedes the judgment or final order in the manner provided by law.
5. _____: _____: _____: _____. In the absence of a supersedeas, a judgment or final order retains its vitality and is capable of being executed during the pendency of the appeal.
6. **Foreclosure: Supersedeas Bonds: Appeal and Error.** Where a decree orders the sale of land, the law in Nebraska explicitly requires that a supersedeas be set out as stated in Neb. Rev. Stat. § 25-1916(3) (Reissue 1985).
7. **Supersedeas Bonds.** A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Richard E. Mueting, of Mueting & Stoffer, for appellant.

James T. Gleason, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee Production Credit Association.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Contending the Madison County District Court lacked jurisdiction to issue an order of sale and to confirm the sale of his foreclosed farmland, defendant-appellant, Philip G. Schmer, asks this court to set aside the sale and order that the property be resold. We affirm.

On October 16, 1987, on the petition of Production Credit

Association of the Midlands (PCA), successor in interest to Norfolk Production Credit Association, the trial court entered a decree foreclosing appellant's farm and ordered it to be sold if the amounts found due were not paid within 20 days. Appellant did not appeal the foreclosure. Instead, he requested and was granted a 9-month stay of sale pursuant to Neb. Rev. Stat. § 25-1506 (Reissue 1985). When a defendant requests a stay of sale pursuant to § 25-1506, that request precludes that defendant from appealing from the foreclosure decree. Neb. Rev. Stat. § 25-1509 (Reissue 1985). See, also, *Federal Farm Mtg. Corporation v. Ganser*, 145 Neb. 589, 17 N.W.2d 613 (1945); *Ohio Nat. Life Ins. Co. v. Baxter*, 139 Neb. 648, 298 N.W. 530 (1941); *Carley v. Morgan*, 123 Neb. 498, 243 N.W. 631 (1932).

Questioning only the trial court's decree as to the priority of competing liens, the validity of a mortgage, and the vitality of her guaranty, Doris M. Schmer, a named defendant and appellant's ex-wife, perfected a separate appeal to this court. She filed a bond which her ex-husband claims was a supersedeas bond. Doris Schmer's appeal was decided adversely to her by this court in *Production Credit Assn. of the Midlands v. Schmer, ante* p. 749, 448 N.W.2d 123 (1989).

On September 12, 1988, on the motion of PCA, the clerk of the trial court issued an order of sale on the foreclosed property which Philip Schmer, claiming lack of jurisdiction of the trial court, moved to quash. In his ruling, the trial judge held that "because the defendant Philip Schmer has taken advantage of the stay provision of the statutes, has not superseded, [and] has not appealed . . . there is no basis to sustain the Motion to Quash the order of sale." We reject the trial court's reasoning, but not its denial of the motion to quash. As stated in *Ohio Nat. Life Ins. Co., supra*, a request for a stay is a waiver of any *prior* error in the proceedings. It is clear, however, that the question of subject matter jurisdiction can be raised at any time in the proceedings. *Gomez v. State ex rel. Larez*, 157 Neb. 738, 61 N.W.2d 345 (1953).

On October 19, 1988, appellant's farmland was sold at a sheriff's sale to PCA. At a hearing on PCA's motion to confirm the sale, Philip Schmer objected, again citing the trial court's

lack of jurisdiction. In overruling the appellant's objection, the trial court once more based its ruling on the fact that the appellant had elected to exercise his right to stay the sale for 9 months. On November 4, 1988, an order confirming the sale of the farm to PCA was entered. Appellant questioned the legality of the sale only on jurisdictional grounds. He did not contest either the procedural validity of the sale or the price for which the farmland sold.

On appeal to this court, Philip Schmer assigns three errors, which, when consolidated, claim that the foreclosure decree had been superseded by his ex-wife's filing of a bond in her appeal to this court. Consequently, the appellant reasons, the trial court was divested of jurisdiction to issue an order of sale of his farm and to confirm the sale.

An appeal to the Supreme Court does not operate as a stay of proceedings unless an appellant supersedes the judgment or final order in the manner provided by law. *Hall v. Hall*, 176 Neb. 555, 126 N.W.2d 839 (1964). In the absence of a supersedeas, a judgment or final order retains its vitality and is capable of being executed during the pendency of the appeal. *Marksbury & Washington v. Board of Education*, 199 Neb. 283, 258 N.W.2d 242 (1977).

The pivotal issue here is whether the bond appellant's ex-wife filed did in fact constitute a supersedeas. That bond states that Doris Schmer "will pay all costs adjudged against her in the Supreme Court of the State of Nebraska and shall prosecute her appeal without delay." PCA contends that her bond, although labeled a "Supersedeas Deposit," is ineffective as a supersedeas because it fails to comply with Neb. Rev. Stat. § 25-1916(3) (Reissue 1985). Section 25-1916(3) provides:

> (3) *When the judgment, decree, or order directs the sale or delivery of possession of real estate*, the bond or cash deposit shall be in such sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay and *will not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate, and pay all costs, and all rents or damages to such real estate which may accrue during the pendency of such*

appeal and until the appellee is legally restored thereto. (Emphasis supplied.)

Where a decree orders the sale of land, the law in Nebraska explicitly requires that a supersedeas be set out as stated in § 25-1916(3). *The Exchange Bank v. Mid-Nebraska Computer Services, Inc.*, 188 Neb. 673, 199 N.W.2d 5 (1972). *State v. Thiele*, 19 Neb. 220, 27 N.W. 109 (1886), also supports this rule. In *Thiele*, there was a failure to include in the bond a condition that "the appellant 'will prosecute such appeal without delay, and will not during such appeal commit or suffer to be committed any waste upon such real estate.' " *Id.* at 222, 27 N.W. at 109. The court held that the bond filed in *Thiele* did not constitute a supersedeas. It reasoned that the purpose of such a condition was to prevent the value of the real estate from being diminished by waste after the foreclosure decree and during the pendency of the appeal. The court observed:

> There is no doubt but that the bond might be amended so as to conform to the requirements of the law at any time, but the fact still remains that the bond is not in conformity to the law, and it is the duty of the clerk to issue the order [of sale] unless such bond is filed.

Id. at 222, 27 N.W. at 110.

In *State v. Laflin*, 40 Neb. 441, 444, 58 N.W. 936, 937 (1894), we held: " 'A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with.' " (Quoting *Sage et al. v. Central R.R. Co. et al.*, 93 U.S. 412, 23 L. Ed. 933 (1876).)

Doris Schmer appealed from a decree foreclosing a mortgage and ordering the sale of real estate. The record before this court fails to reveal that the trial court approved any bond for that appeal. Her bond does not contain a condition that during her appeal Doris Schmer would not commit or suffer to be committed any waste upon the farmland under foreclosure or that she would pay all rents or damages to the real estate which might accrue during the pendency of her appeal. Thus, her bond did not constitute a supersedeas.

At oral argument, appellant contended that Doris Schmer's bond was sufficient to supersede the execution of a conveyance in accordance with § 25-1916(2). A decree that orders the sale

of real estate must comply with § 25-1916(3). *The Exchange Bank v. Mid-Nebraska Computer Services, Inc., supra.* Any bond intended to fall within the provisions of § 25-1916(2) would be ineffective as a supersedeas where the sale of real estate has been ordered.

In *Collins v. Brown*, 64 Neb. 173, 89 N.W. 754 (1902), while a foreclosure action was pending in the Supreme Court, the defendants filed a supersedeas bond of $500 which was approved by the district court. The foreclosure decree was executed by sale of the property. Defendants resisted confirmation of the sale, claiming the decree had been superseded. This court affirmed confirmation of the sale, finding that the supersedeas did not contain a condition that the defendants or their surety would pay " 'the value of the use and occupation of the property' affected by the decree" as required by statute. *Id.* at 174, 89 N.W. at 755. Since the undertaking did not comply with the statute, this court held that the undertaking did not operate as a supersedeas.

In reviewing the bond filed by Doris Schmer, we note that she only pledged to pay all costs adjudged against her in this court and to prosecute her appeal without delay. On its face, this pledge comports with the language of only a cost bond. Neb. Rev. Stat. § 25-1914 (Reissue 1985). In *State v. Laflin, supra*, we held that a bond that omitted a condition required by statute was merely a cost bond.

The bond filed by Doris Schmer fails as a supersedeas under § 25-1916(3) because it omits a condition that during her appeal she would not commit or suffer to be committed any waste upon the farmland under foreclosure. Nor does the bond contain a condition that Doris Schmer would pay all rents or damages to the farmland which might accrue during the pendency of her appeal. Consequently, the trial court had jurisdiction to order the sale of Philip Schmer's farmland and to confirm the sale in PCA, and the judgment is affirmed.

AFFIRMED.

DAVID SPANGLER, SR., APPELLANT, V. STATE OF NEBRASKA, NEBRASKA STATE PATROL, APPELLEE.

448 N.W.2d 145

Filed November 17, 1989. No. 89-337.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court have the same force and effect as a verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation.** A workers' compensation claimant may recover where an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that absent the preexisting condition no disability would have resulted.
4. **Workers' Compensation: Proof.** To sustain an award in a workers' compensation case involving a preexisting disease or condition, it is sufficient to show that the injury resulting from an accident arising out of and in the course of employment and the preexisting disease or condition combined to produce disability, or that the employment injury aggravated, accelerated, or inflamed the preexisting condition.
5. **Workers' Compensation.** An injury, disability, or death that is the result of the normal progression of any preexisting condition or that is due to natural causes, although occurring while the employee is at work, is not compensable under the Workers' Compensation Act.
6. **Workers' Compensation: Proof.** Where there is a preexisting condition, the burden of proof is upon a workers' compensation claimant to show by a preponderance of the evidence that the disability sustained was caused by an accident arising out of and in the course of employment and was not the result of the normal progression of claimant's preexisting condition.
7. _____: _____. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment, in the sense that the claimant must persuade the Workers' Compensation Court as the trier of fact that the disability sustained was not the result of the normal progression of the claimant's preexisting condition.
8. _____: _____. If it is asserted that an accidental injury developed over a period of time because of employment exertion, a workers' compensation claimant, in order to establish that the injury arose out of the employment, must show that the employment exertion contributed to the cause of the injury in some material and substantial degree.
9. _____: _____. In heart disease cases a workers' compensation claimant has the burden of establishing by a preponderance of the evidence that exertion or stress in his employment contributed in some material and substantial degree to cause the heart injury.
10. _____:_____. An exertion- or stress-caused heart injury to which a workers'

compensation claimant's preexisting heart disease or condition contributes is compensable only if the claimant establishes that the exertion or stress experienced during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.

11. **Workers' Compensation: Trial.** In workers' compensation cases, issues with regard to the cause of injury and disability are matters of fact to be determined by the Workers' Compensation Court, which sits as the finder of fact.
12. **Workers' Compensation: Expert Witnesses.** As the finder of fact the Workers' Compensation Court is not required to take the opinion of an expert in regard to the causal connection between the alleged accident or exertion and the resulting disability as binding upon it.
13. **Statutes: Courts.** It is not within the province of the Supreme Court, the Workers' Compensation Court, or any other tribunal to read a meaning into a statute which is not warranted by its language.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

J. Murry Shaeffer, P.C., for appellant.

Robert M. Spire, Attorney General, and William J. Orester for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The employee plaintiff-appellant, David Spangler, Sr., challenges the denial of workers' compensation benefits from his former employer, defendant-appellee State of Nebraska. His assignments of error merge to claim that the Nebraska Workers' Compensation Court erred in concluding that (1) he failed to sustain his burden of proving that his employment exertion or stress contributed in some material and substantial degree to cause the disability he suffers as the consequence of heart disease, and (2) Neb. Rev. Stat. § 18-1723 (Reissue 1987), which raises a rebuttable presumption that there is an "in the line of duty" cause of heart disease in certain police officers, does not apply to workers' compensation cases. We affirm.

Spangler filed a petition alleging that between approximately January 3 and 19, 1986, he sustained personal injury in an accident arising out of and in the course of his employment when he, while working for the Nebraska State Patrol as a sergeant, developed heart disease resulting from the "exertion"

of his employment. In denying liability the State answered that Spangler's condition "was the result of the natural progression of a preexisting condition unrelated to employment."

Spangler began work for the patrol in 1971 as a traffic officer. In 1979, he was promoted and assigned to supervise several other officers who, having been passed over for promotion in the past, resented him. According to Spangler, their resentment made his supervisory duties "extremely" difficult. In 1981, Spangler was again promoted, conditioned on his transfer to another city. Spangler viewed the anticipated move as stressful because he was unable to sell his house.

In any event, Spangler was not transferred because he suffered an inferior myocardial infarction. As he describes it, "in February of 1981 . . . I was suffering chest pains and went to the emergency room at the hospital . . . and was admitted for . . . a minor heart attack," and then the following Wednesday, "I suffered a major heart attack." Spangler, then 32 years of age, was diagnosed as suffering from ischemic heart disease.

After recovering, Spangler was assigned in a supervisory capacity to the Governor's mansion security detail. Eventually, he became the then Governor's travel coordinator. As a consequence, Spangler's duties and working hours increased, and according to Spangler, the work involved "a lot more stress."

Spangler suffered another acute inferior myocardial infarction in May 1984 and in June experienced angina and underwent coronary artery bypass graft surgery. There was some evidence that the 1984 angina was precipitated by the receipt of an undescribed bill which upset him.

Pursuant to authorization by his treating physician, Spangler returned to work at the Governor's mansion in July 1984 with no duty limitations. He was still working between 46 and 50 hours per week and frequently suffered chest pain while driving at high speeds through heavy traffic when the Governor was behind schedule.

Spangler was again hospitalized in January 1986 with severe chest pain and was diagnosed as having progressive unstable angina pectoris, which is a symptom of underlying coronary artery disease. After the 1986 hospitalization, Spangler's family

physician and his cardiologist determined that Spangler should not return to work because he was endangering himself, the Governor, and fellow officers. Spangler was deemed medically disabled and placed on medical retirement from the patrol on July 21, 1986.

According to Spangler, the angina he experienced was provoked by driving at high speeds to deliver the Governor to the airport the day before he was hospitalized. Spangler testified that he did not experience chest pains at home except during physical exertion on hot, humid days and when receiving telephone calls related to work.

Dr. Sabyasachi Mahapatra testified that the stresses Spangler confronted at work contributed to or aggravated his angina pectoris. In Mahapatra's opinion, Spangler's symptoms were related to driving at high speeds, and, thus, Spangler should discontinue his work for the patrol to prevent aggravation or precipitation of the symptoms of his heart disease. Mahapatra further testified that in January 1988 there was no indication that Spangler's heart disease had worsened since his retiring from the patrol and otherwise limiting his physical activity.

Dr. Joseph Jarzobski testified that Spangler should not continue his work for the patrol, that his physical activity is significantly restricted, and that his heart disease is a permanent condition. However, Jarzobski also testified that Spangler suffered some degree of physical impairment from the coronary heart disease before he was hospitalized in 1986 for angina pectoris. Jarzobski could not be sure whether the angina pectoris Spangler suffered in 1986 increased his level of permanent physical impairment beyond what it had been before the 1986 hospitalization, stating:

> It's hard to be sure if that time frame where the symptoms occurred that you referred to really made things tremendously worse. It's part of the whole disease process. And it's a progressive process. At this moment I don't recall that he actually had a heart attack during that time frame. So the angina is short of a heart attack, and theoretically, is controllable with medicine and limiting activity. But whether that time frame made things worse or not, it's hard to be positive.

However, although Jarzobski could not "say with certainty" that Spangler's employment caused his heart disease, he did "feel that it definitely contributed to and aggravated the heart disease."

Spangler's family has a history of heart disease. His mother died of a heart attack, and two brothers suffer from heart disease. At the time of his hospitalization in 1986, Spangler smoked excessively, suffered from hypertension, was overweight, had an elevated cholesterol level, and was of a deadline-setting, pushing, and driving personality. Both Mahapatra and Jarzobski testified that these conditions are significant risk factors associated with the development and aggravation of coronary artery disease. Although Jarzobski believed that Spangler's work stress combined with these risk factors to aggravate Spangler's heart disease in 1986, Jarzobski was unable to allocate the amount of aggravation to Spangler's heart condition which was attributable to Spangler's work stress and to each of the risk factors. Jarzobski also testified that the angina Spangler suffered in 1986 was the result of the natural progression of his coronary artery disease and that Spangler occasionally experienced angina when at rest.

Spangler elicited testimony from an assistant professor of criminal justice, who testified that based on the "consistent findings" of increased heart and cancer problems, mortality and suicide rates, and marital difficulties, "it's fairly clear that police officers experience higher levels of stress than either members of the general population or than persons associated with other occupations." According to this witness, the findings of increased stress were uniform among all law enforcement officers, regardless of the size, location, or function of the department in which the officers were employed.

We begin our analysis of Spangler's first summarized assignment of error, which questions the compensation court's conclusion that he failed to sustain his burden of proof, by noting that the findings of fact made by the Workers' Compensation Court have the same force and effect as a verdict in a civil case and will not be set aside unless clearly wrong. *Schlotfeld v. Mel's Heating & Air Conditioning, ante* p. 488, 445 N.W.2d 918 (1989); *Alley v. Titterington, ante* p. 71, 443

N.W.2d 615 (1989). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Id.*

It is undisputed that at the time of his hospitalization in 1986, Spangler had a preexisting heart condition. Thus, in order to resolve Spangler's contentions, it is necessary to understand the legal principles involved where the claimant has such a preexisting condition.

We have said that a workers' compensation claimant may recover where an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that absent the preexisting condition no disability would have resulted. *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984). To sustain an award in a workers' compensation case involving a preexisting disease or condition, it is sufficient to show that the injury resulting from an accident arising out of and in the course of employment and the preexisting disease or condition combined to produce disability, *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987), or that the employment injury aggravated, accelerated, or inflamed the preexisting condition, *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981), and *Keith v. School Dist. No. 1*, 205 Neb. 631, 289 N.W.2d 196 (1980). However, an injury, disability, or death that is the result of the normal progression of any preexisting condition or that is due to natural causes, although occurring while the employee is at work, is not compensable under the Workers' Compensation Act. *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988); *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980); *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978); Neb. Rev. Stat. § 48-151(4) (Reissue 1988).

The burden of proof is upon the claimant to show by a preponderance of the evidence that the disability sustained was caused by an accident arising out of and in the course of employment. *Elliott v. Midlands Animal Products*, 229 Neb. 823, 428 N.W.2d 920 (1988); § 48-151(2). The presence of a preexisting condition enhances the degree of proof required to

establish that the injury arose out of and in the course of employment, *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988), and *Gilbert v. Sioux City Foundry, supra*, in the sense that the claimant must show that the disability sustained was not the result of the normal progression of the claimant's preexisting condition, *Elliott v. Midlands Animal Products, supra*, *Wilson v. City of North Platte*, 221 Neb. 90, 375 N.W.2d 134 (1985), *Benson v. Barnes & Barnes Trucking, supra*, and *Engel v. Nebraska Methodist Hospital, supra* (claimant not required to prove that natural progression of disease or condition will not result in disability sometime in the future).

We have long discarded the view that an accidental injury must be caused by a single traumatic event to be compensable under the Workers' Compensation Act. *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980); *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969). However, if it is asserted that the injury developed over a period of time because of employment exertion, the claimant, in order to establish that the injury arose out of the employment, must show that the employment exertion contributed to the cause of the injury in some material and substantial degree. *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987). This rule has particular application in cases involving heart conditions. We have held that in such cases the claimant has the burden of establishing by a preponderance of the evidence that exertion or stress in his employment contributed in some material and substantial degree to cause the heart injury. *Mann v. City of Omaha*, 211 Neb. 583, 319 N.W.2d 454 (1982); *Sellens v. Allen Products Co., Inc., supra*; *Newbanks v. Foursome Package & Bar, Inc., supra*.

Accordingly, an exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress experienced during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person. *Mann v. City of Omaha, supra*; *Sellens v. Allen Products Co., Inc., supra*; *Newbanks v. Foursome Package & Bar, Inc., supra*. This requirement flows

from the application of the increased burden imposed in preexisting condition cases to the unique problem of proving the cause of a myocardial infarction. See, *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984); *Engel v. Nebraska Methodist Hospital, supra*.

Although many of the circumstances in *Mann* are similar to those now before us, *Mann* is different in a crucial respect. In *Mann*, the employee police officer sued to recover benefits from his employer as the result of a second heart attack he suffered on October 2, 1980. He had been working as a police officer for 19 years and had suffered a previous heart attack in 1978. After the first heart attack, he returned to work as completely recovered, with no disabilities or limitations on his duties. For 1½ years before his second attack, the officer had been assigned to a district which abutted a high-risk district where he was frequently summoned. A witness testified that police officers, especially those serving in densely populated urban areas, suffer significantly more stress than the population generally.

Like Spangler, Mann had several personal risk factors associated with a higher-than-average incidence of coronary artery disease. He had a family history of early myocardial infarctions, was a heavy smoker, and was mildly overweight. Nevertheless, expert testimony established that Mann's second heart attack was the result of employment stress. At the time of the first heart attack, Mann's right coronary artery was free of obstruction, but by the time of the second heart attack, that artery was completely obstructed. According to Mann's treating physician, the relatively rapid obstruction was unusual. The physician was of the opinion that Mann's personal risk factors could not have accelerated the obstruction to that extent, saying: " 'I find it inconceivable that [Mann's personal risk factors] were significant contributors to the heart attack in 1980. . . .' " *Mann* at 589, 319 N.W.2d at 457. Instead, Mann's physician was of the opinion that the rapid obstruction was the result of abrupt rises in blood pressure related to Mann's police work.

In reversing the compensation court's conclusion that there was insufficient evidence for the court to single out stress as the

primary or leading causal agent in Mann's disease, we said:

> In this case there was a sufficient showing that the appellant experienced greater stress in his employment life than in his nonemployment life. It has often been stated by this court that the opinions of experts are not binding on the trier of fact. . . . However, where the medical testimony is uncontroverted, unimpeached, and is given in matters of medical diagnosis which are peculiarly within the range of the knowledge of the expert, the compensation court is not free to substitute its own diagnosis. It is not true that in every case the uncontested opinion of an expert is binding on the trier of fact, but where, as here, the testimony is based on firsthand knowledge, is credible, and has no demonstrable weaknesses or failure of foundation, such testimony cannot be ignored.

Mann at 592-93, 319 N.W.2d at 459.

Nonetheless, it must be remembered that in workers' compensation cases, issues with regard to the cause of injury and disability are matters of fact to be determined by the Workers' Compensation Court, which sits as the finder of fact. *Tatara v. Northern States Beef Co.*, 230 Neb. 230, 430 N.W.2d 547 (1988). As the finder of fact the compensation court is not required to take the opinion of an expert in regard to the causal connection between the alleged accident or exertion and the resulting disability as binding upon it. See *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983). See, also, *Tatara v. Northern States Beef Co., supra*.

Although both Mahapatra and Jarzobski testified that the stresses of Spangler's employment contributed to and aggravated the angina for which Spangler was hospitalized in 1986, Jarzobski was unable to testify as to whether the angina pectoris Spangler suffered in 1986 increased his level of permanent physical impairment beyond what it had been before the 1986 hospitalization. In addition, it is clear that Spangler has many of the personal risk factors associated with coronary artery disease. Unlike the situation in *Mann*, where the physician found it "inconceivable" that the personal risk factors were significant contributors to Mann's heart attack and instead opined unequivocally that the heart attack was

caused by work-related rises in blood pressure, Jarzobski was unable to determine the amount of aggravation to Spangler's heart condition which was attributable to his work stress and that which was attributable to the personal risk factors.

Thus, there was sufficient evidence for the compensation court to determine that Spangler's work-related stress did not contribute in a material and substantial degree to cause his heart disease and that instead Spangler's 1986 angina was merely the regrettable result of the normal progression of his condition.

Spangler further asserts, in his second summarized assignment of error, that contrary to the compensation court's conclusion, § 18-1723 applies to workers' compensation cases. Spangler introduced into evidence a copy of § 18-1723 as it existed before the 1985 legislative session. However, in 1985, before Spangler suffered the injury for which he seeks compensation benefits, the Legislature made modifications to § 18-1723, which now provides in relevant part:

> Whenever . . . any police officer of any city or village . . . shall suffer death or disability as a result of hypertension or heart or respiratory defect or disease, there shall be a rebuttable presumption that such death or disability resulted from accident or other cause while in the line of duty for all purposes of Chapter 15, article 10, sections 16-1001 to 16-1042, and any . . . police officer's pension plan established pursuant to any home rule charter, the Legislature specifically finding the subject of this section to be a matter of general statewide concern.

Chapter 15, article 10, and Neb. Rev. Stat. §§ 16-1001 to 16-1042 (Reissue 1987) concern retirement systems for certain police officers and firefighters. Thus, even if the statute applies to members of the patrol, a matter we do not decide, the clear import of the language of § 18-1723 is that the rebuttable presumption it creates applies only for purposes of the designated pension plans and retirement systems. It is not within the province of the Supreme Court, the Workers' Compensation Court, or any other tribunal to read a meaning into a statute which is not warranted by its language. See *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb.

288, 436 N.W.2d 151 (1989).

For the foregoing reasons, the compensation court's order of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. SHAWN J. STATEN, APPELLEE.
448 N.W.2d 152

Filed November 17, 1989. No. 89-691.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed.

Ronald L. Staskiewicz, Douglas County Attorney, and Robert C. Sigler for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellee.

SHANAHAN, J.

In its information, the State charged Shawn J. Staten with unlawful possession with intent to distribute a controlled substance (cocaine). See Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988). Staten filed a motion to suppress the physical evidence (cocaine), see Neb. Rev. Stat. § 29-822 (Reissue 1985), and her custodial statements, see Neb. Rev. Stat. § 29-115 (Reissue 1985). Because the district court for Douglas County sustained Staten's suppression motions, the State appeals and seeks review by a judge of this court, pursuant to Neb. Rev. Stat. §§ 29-824 and 29-116 (Reissue 1985).

On the morning of March 29, 1989, in the Kansas City International Airport, Agent Carl Hicks of the Federal Drug Enforcement Agency was routinely observing arrival of flights from Los Angeles, California, and noticed a man and a woman, later identified as Tracy Wood and Staten, whom he described as "suspicious" inasmuch as the couple fit the drug courier profile. When Hicks approached the pair and asked

them for identification, Wood and Staten said they had none. However, Staten later produced some identification and also displayed their plane tickets. Hicks noted that Wood and Staten had paid cash for their plane tickets and that they were flying to Omaha on Braniff Airline flight 1490, which was scheduled to arrive in Omaha at 8:30 that morning. Since no drug detection dog was available at Kansas City and because the couple's luggage was already on board the Omaha flight scheduled for departure in the next few minutes, Hicks terminated the interview with Wood and Staten, who boarded Braniff flight 1490 to Omaha.

Hicks telephoned Sgt. James Cisar of the Omaha Police Division and related Hicks' observations at the Kansas City International Airport. Cisar immediately called Sgt. William Agnew of the Omaha Police Division's narcotics unit. Agnew assembled a team of FBI agents and Omaha police officers, who went to Eppley Airfield to meet Braniff flight 1490. Agnew also contacted Steve Sanchelli, an Omaha police officer who handles "Bush," a dog used for drug detection by the Omaha Police Division, and asked Sanchelli to bring Bush to the airport. On arrival at the airport, the officers and the FBI agents went to gate 21, where flight 1490 was to arrive, and set up surveillance. When flight 1490 arrived at 8:30 a.m., the officers observed Wood and Staten disembark from the plane and walk to the baggage claim area. Staten made a phone call, after which she and Wood retrieved three pieces of luggage and began to walk toward the airport's main terminal area. Agnew approached Wood and Staten, identified himself as a police officer conducting a "narcotics investigation," and asked them to produce their plane tickets. Staten said she had discarded her ticket on the plane. When Agnew asked for some identification, Staten showed Agnew a copy of a birth certificate and her Social Security card. Agnew told Wood and Staten that a drug detection dog was en route to the airport and asked whether they would consent to having the dog "sniff" their luggage for the possible presence of controlled substances. Staten agreed to let the dog sniff her luggage.

Wood and Staten accompanied the officers to the airport security area, where Agnew asked Staten about the reason for

her presence in Omaha. Staten responded that she was visiting her brother, Harry Harris. Agnew knew that Harry Harris, an alias for Dan Staten, was in custody. Harris was a member of a Los Angeles gang and was "involved in narcotics activity" in Omaha. Also, Agnew had personally arrested Staten's sister, Mowesha Staten, in an Omaha motel for possession of a controlled substance.

Approximately 15 minutes after Staten had arrived in Omaha, Officer Sanchelli arrived at the airport with Bush, the drug detection dog. Bush had been specially trained in locating cocaine, heroin, and other controlled substances and was used to "alert" officers to the presence of a controlled substance within luggage. The "alert" consists of Bush's sniffing luggage and then biting or scratching luggage which contains a controlled substance. Bush had positively verified controlled substances in luggage on 18 occasions before Staten encountered the officers at the Omaha airport. Luggage with Staten's name was placed in the airport hallway for Bush's "off-leash" sniffing. Bush sniffed three pieces of luggage and "alerted" to one piece of luggage, indicating that there was a controlled substance in the baggage item in Staten's name. Staten told Agnew that he could search her luggage but not search her. As far as the record discloses, there was no female officer at the airport to conduct a search of Staten's person. According to Agnew: "At that point I informed [Staten] that she was under arrest for suspicion of possession of a controlled substance and she would be taken to central police headquarters and we were going to apply for a search warrant for her luggage and her person." No one questions that Staten was arrested for possession of a controlled substance at the airport. The officers then transported Staten to police headquarters.

At police headquarters, Staten was taken to an interview room where, shortly after 10 a.m., Officer James Haiar presented her with a *Miranda* "rights advisory form." Although Staten refused to make a statement, a few minutes later she indicated to officers that she would be willing to make a statement. Meanwhile, Agnew prepared an application for a search warrant. The county court for Douglas County issued a

search warrant at 1:25 p.m. In the presence of a female police officer, the warrant, which authorized a search of Staten's person and her luggage, was immediately served on Staten. After Staten had read the warrant, which she understood, she removed a plastic bag, containing 6 ounces of cocaine, from her bra. The police presented a second "advisory form" regarding the *Miranda* admonition. Staten indicated that she understood her rights, made statements to the police, and was booked for possession of a controlled substance (cocaine).

Staten filed a motion to suppress the cocaine, claiming that the evidence was obtained through an unreasonable search of her person. See, Neb. Const. art. I, § 7; U.S. Const. amend. IV. In a companion motion, Staten requested suppression of her custodial statements to the police, contending that her statements were the product of an illegal search and unlawful arrest.

In granting the suppression motions, the district court concluded:

> When the dog alerted to the defendant's luggage the officer had sufficient facts to show the county judge probable cause for the issuance of a search warrant to search the luggage. There was as yet no probable cause to include the person of the defendant in the affidavit for the search warrant nor the search warrant itself. The warrant was overreaching in its scope and unreasonably subjected the defendant to a potential strip search based primarily on the trained dog's alert to her luggage. If upon a search of the luggage contraband had been found, the defendant would be subject to immediate arrest and search incident to the arrest. The arrest of the defendant after the dog alerted to the luggage was an unlawful arrest. The execution of the search warrant upon the person of the defendant several hours later was without probable cause that a crime had been committed by her and all fruits of the search of the defendant must be excluded from her trial in this case.
>
> Similarily [sic], any statements given by the defendant were a product of the unlawful arrest and improper search and the statement is likewise excluded from use by the

State against the defendant at the trial herein.

The State contends that the police had probable cause to arrest Staten, that the search warrant for Staten's luggage and her person was valid, that the search was reasonable and not in violation of Staten's constitutional rights, and that Staten's statements to police were not the product of a constitutionally invalid search.

STANDARD OF REVIEW

The issue is whether the contraband and statements were obtained in violation of the protection afforded by the state and federal Constitutions against an unreasonable search and seizure.

"In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous." *State v. Copple*, 224 Neb. 672, 689, 401 N.W.2d 141, 154 (1987).

"In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress." *State v. Dixon*, 222 Neb. 787, 795, 387 N.W.2d 682, 687 (1986).

PROBABLE CAUSE TO ARREST

The State contends that because the police believed that Staten had controlled substances in her luggage as a result of Bush's "alert" to the luggage, probable cause existed for Staten's arrest. The question is, therefore, whether a drug detection dog's "alert" to luggage, indicating the presence of a controlled substance, constitutes probable cause to arrest.

Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police can stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment. See, also, *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). Reasonable suspicion entails some minimal level of objective justification for the detention, something more than

an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *United States v. Sokolow*, ____ U.S. ____, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989).

The U.S. Supreme Court has held that persons whose appearance and activities fit the so-called drug courier profile may be briefly detained by law enforcement officers under *Terry v. Ohio*. See, *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *United States v. Sokolow, supra*. The drug courier profile is a compilation of characteristics found to be typical for persons transporting illegal drugs, such as trips to and from cities which are major sources of drugs, with short stays in the cities; cash payment for tickets; use of aliases; unchecked luggage and little or no identification on luggage; attire; and nervousness. See *United States v. Sokolow, supra*. Neither the State nor Staten disputes the district court's finding that police did not violate Staten's constitutional rights in detaining her at the airport.

In *Florida v. Royer, supra*, the U.S. Supreme Court held that police had no probable cause to arrest the defendant based upon the facts that he was traveling from Miami to New York City under an assumed name; that he was carrying two suitcases that appeared to be heavy; that he was young, was casually dressed, and appeared to be pale and nervous; and that he had paid for his ticket in cash with a large number of bills. The fact that defendant fit the so-called drug courier profile constituted adequate grounds for suspecting the defendant of carrying drugs and justified an investigatory stop by police officers. *Id.* However, when the police officers took the defendant to a small room for further interrogation, retrieved his checked luggage from the airline, took his airplane ticket and identification, and never informed defendant that he was free to leave at any time nor that he need not consent to the search of his luggage, the Supreme Court held that the investigatory stop exceeded the constitutional limitation of a *Terry* stop. See *Terry v. Ohio, supra*. The *Royer* Court found that the means employed by the police officers were too intrusive to effectuate an investigative detention and that restraint of the defendant was unjustified,

and then concluded that there were less intrusive means which the officers could have employed:

> The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary. A negative result would have freed [the defendant] in short order; *a positive result would have resulted in his justifiable arrest on probable cause.*

(Emphasis supplied.) 460 U.S. at 505-06.

At least three federal appellate courts have held that an "alert" by a trained drug detection dog constitutes probable cause for arrest. See, *U.S. v. Massac*, 867 F.2d 174 (3d Cir. 1989); *United States v. Waltzer*, 682 F.2d 370 (2d Cir. 1982); *United States v. Williams*, 726 F.2d 661 (10th Cir. 1984). Appellate courts in three state jurisdictions have also expressly held the same. See, *State v. Bullock*, 460 So. 2d 517 (Fla. App. 1984); *State v. Foster*, 390 So. 2d 469 (Fla. App. 1980); *People v. Campbell*, 67 Ill. 2d 308, 367 N.E.2d 949 (1977); *Morrow v. State*, 757 S.W.2d 484 (Tex. App. 1988) (even in the absence of consent to search, a drug detection dog's "alert" to the presence of narcotics in defendant's luggage justified the arrest of appellant).

The use of trained dogs to detect the presence of controlled substances in luggage has been held to be a feasible and expeditious way to detain a suspect for the shortest period of time in which to confirm or dispel suspicions. See *Florida v. Royer, supra*. See, also, *United States v. Place, supra* (canine sniff discloses only the presence or absence of narcotics, and such limited disclosure ensures against the embarrassment and inconvenience of the owner that is possible with other, more intrusive means of investigation). This conclusion is based on the fact that dogs trained especially for the purpose of detecting a controlled substance can detect the presence of concealed narcotics with almost unerring accuracy. When Bush "alerted" to Staten's luggage, this fact, combined with the other

circumstances known to the police, supplied probable cause to arrest Staten.

VALIDITY OF SEARCH WARRANT

In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Supreme Court held that if there is a lawful arrest, police have authority, without a search warrant, to conduct a full search of the person arrested and that such search is reasonable under the fourth amendment to the U.S. Constitution. Further, a police officer's search is not limited to searching the arrested person for weapons only; the officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence. *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). A search incident to arrest need not be made immediately on arrest. "[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." *United States v. Edwards*, 415 U.S. 800, 803, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). See, also, *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960). See, further, *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982) (arresting officers may search person of arrestee to discover and remove weapons and to seize evidence to prevent its concealment or destruction, as well as search the area within the arrestee's immediate control); *State v. McElroy*, 189 Neb. 376, 202 N.W.2d 752 (1972) (arrest of defendant and later search of defendant's person at police station held lawful).

As noted, the district court found that while there was probable cause for the warrant to search Staten's luggage, there was no probable cause for issuance of a warrant to search Staten's *person*. However, as previously indicated, Bush's alert to the luggage constituted sufficient probable cause to arrest Staten. Thus, a warrant was unnecessary for a search of Staten's person because the police were entitled to search Staten as an incident of her lawful arrest.

The search of Staten's person, an incident of her lawful arrest, is not unreasonable and, therefore, does not violate the

constitutional protection against an unreasonable search and seizure. A search warrant was unnecessary. Consequently, whether a warrant authorizing the search of Staten's person is valid need not be reviewed. Cf. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989) (doctrine of "inevitable discovery" in reference to an allegedly unconstitutional search and seizure).

The cocaine, as physical evidence obtained from Staten's person, is constitutionally admissible. Staten's custodial statements are not "fruits of the poisonous tree" and, therefore, are admissible. See *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

Under the circumstances, the district court's findings that the physical evidence and statements from Staten were products of an unreasonable search and seizure are clearly erroneous. For that reason, the district court's judgment suppressing the evidence obtained from Staten's person and suppressing her custodial statements is reversed.

REVERSED.

NI INDUSTRIES, INC., APPELLEE AND CROSS-APPELLANT, V. HUSKER-HAWKEYE DISTRIBUTING, INC., APPELLANT AND CROSS-APPELLEE, AND KEITH B. EDQUIST, APPELLEE AND CROSS-APPELLEE.

448 N.W.2d 157

Filed November 22, 1989. No. 86-869.

1. **Appeal and Error.** In an action at law tried to the court without a jury, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. It is not within the province of the Supreme Court to resolve conflicts in or reweigh evidence.
2. **Evidence: Trial: Rules of the Supreme Court.** Any matter admitted under Neb. Ct. R. of Disc. 36(b) (rev. 1989) is conclusively established unless the court on motion permits withdrawal or amendment of the admission.
3. **Interest: Contracts.** Where the parties have a contract for the payment of a particular lawful rate of interest to be paid after the maturity of the debt and on default in payment, such contract controls, and the rate thus fixed is recoverable provided the rate is not unconscionable.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed as modified.

E. Dean Hascall, of Hascall, Jungers & Garvey, for appellant.

John D. Hartigan, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee NI Industries.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and MORAN and BROWER, D. JJ.

BROWER, D.J.

Husker-Hawkeye Distributing, Inc., appeals an order of the district court for Douglas County entering judgment against it in the amount of $15,599.41, plus interest from June 7, 1984, on an amended petition brought by NI Industries, Inc., to recover an unpaid account. NI Industries cross-appeals the dismissal of defendant Keith B. Edquist and the allowance of a setoff in favor of Husker-Hawkeye for merchandise authorized for return.

In an action at law tried to the court without a jury, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Preisendorf v. Mettenbrink*, 232 Neb. 558, 441 N.W.2d 203 (1989). It is not within the province of the Supreme Court to resolve conflicts in or reweigh evidence. *Bruning Seeding Co. v. McArdle Grading Co.*, 232 Neb. 181, 439 N.W.2d 789 (1989); *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985).

In 1982, Husker-Hawkeye began distributing products for Thermador/Waste King, a division of NI Industries. Husker-Hawkeye received inventory from the previous distributor through NI Industries and paid NI Industries for the products.[1] On March 24, 1983, Edquist, president of Husker-Hawkeye, signed a distributorship agreement between Husker-Hawkeye and NI Industries. The contract was signed by the vice president of sales and marketing of Thermador/Waste King on behalf of NI Industries on April 6, 1983. The contract allowed either party to terminate the agreement upon 60 days' written notice. The contract also provided:

> In the event of the termination of this Agreement by either party for any reason, the Company may at its option repurchase from Distributor F.O.B. the Company's dock at Vernon, California, any Products and any spare parts thereof on hand in the Distributor's place of business or in the possession of the Distributor at the net price paid by the Distributor to the Company, less actual freight on the shipment thereof to return the Products and spare parts to the Company. On demand the tender of the repurchase price, the Distributor shall be obligated to deliver such Products and spare parts to the Company forthwith. The Company reserves the right, however, to reject any Product or spare parts [sic] not in first class condition or which has been removed from its carton, or which is not a current model.

In January 1984, Edquist informed James Roach, regional sales manager for Thermador/Waste King in charge of Minnesota, Iowa, Nebraska, North Dakota, South Dakota, and Montana, that Husker-Hawkeye was not satisfied with its performance with the Thermador/Waste King product line and wished to cease distributing the products. Roach informed E. Toby Bowen, area sales manager, of Husker-Hawkeye's intentions to terminate in a memorandum dated January 24, 1984.

Husker-Hawkeye agreed to continue as a distributor until a replacement distributor could be found. According to Edquist, this agreement was in exchange for an agreement by NI Industries, through Roach, to repurchase all inventory Husker-Hawkeye had on hand when the new distributor took over. The actual notice of termination was dated March 25, 1984, although Edquist testified it was not sent until the latter part of May 1984. Husker-Hawkeye continued to order and purchase stock from NI Industries.

On June 6, 1984, Roach and Bowen went to Husker-Hawkeye to begin making arrangements for the transfer of inventory to the new distributor. Edquist gave them a list of the inventory on hand. At this time Bowen told Edquist that NI Industries would transfer only current inventory still in the original carton.

After the meeting, Roach and Bowen finalized arrangements for the transfer of most of the inventory to either the new distributor or to a distributor in St. Louis who agreed to take the merchandise which was in the process of being eliminated from NI Industries' product line.

On June 7, 1984, Roach and Bowen returned to Husker-Hawkeye. At that time they were prepared to begin the process of transferring the inventory. They reiterated the fact that the only inventory to be transferred was inventory which was undamaged, current, and still in the original carton. Edquist told Roach and Bowen that unless NI Industries repurchased all the inventory in Husker-Hawkeye's possession, it could not repurchase any of the inventory. Roach and Bowen then left Husker-Hawkeye, apparently having decided to exercise NI Industries' option under the contract not to repurchase the inventory.

NI Industries brought suit against Husker-Hawkeye and Edquist to recover $16,844.81 for purchases made by Husker-Hawkeye between March and May of 1984. Defendant Husker-Hawkeye, in its answer, admitted the existence of the distributorship agreement, but alleged that the agreement expired on December 31, 1983, and that the parties agreed NI Industries would take back all undistributed inventory in Husker-Hawkeye's possession at the time Husker-Hawkeye ceased distribution of NI Industries' products. Further, Husker-Hawkeye alleged it had tendered possession of the inventory to NI Industries. Husker-Hawkeye, by way of a counterclaim, sought an order directing NI Industries to give Husker-Hawkeye full credit for the value of the inventory, to remove the inventory at its expense, to pay a fair and reasonable amount for storage, and to pay $1,500 for cooperative advertising allowance. (Prior to trial, Husker-Hawkeye received the credit for the advertising allowance.) Defendant Edquist filed a general denial.

Following trial, the court found Husker-Hawkeye purchased inventory pursuant to a distributorship agreement in the amount of $16,844.41, which amount remained unpaid. The court found there was a bona fide dispute as to the amount due until June 7, 1984; therefore, no prejudgment interest was

awarded prior to that date. The court gave Husker-Hawkeye credit for $1,245 for merchandise which the court found Husker-Hawkeye was authorized to return. The court also found Edquist's only involvement in the transaction was as president of Husker-Hawkeye and dismissed the action against Edquist. Pursuant to its findings, the court entered judgment against Husker-Hawkeye in the amount of $15,599.41, plus interest from June 7, 1984.

Husker-Hawkeye appeals, claiming the trial court erred in not ordering NI Industries to credit its account for the full value of the inventory and in awarding prejudgment interest. NI Industries cross-appeals, claiming the trial court erred in dismissing its amended petition against Edquist and in allowing the setoff.

Husker-Hawkeye's first assignment of error claims the trial court erred in not giving it credit for the full value of the inventory in its possession. This argument is based on the contract as Husker-Hawkeye contends it existed; that is, NI Industries agreed to repurchase all inventory in Husker-Hawkeye's possession in return for Husker-Hawkeye's continuing as a distributor until a replacement could be found.

The trial court found the distributorship contract continued in existence until Husker-Hawkeye formally terminated the agreement by the letter sent in May 1984. The court based its finding on Husker-Hawkeye's answers to requests for admissions. In its answers, Husker-Hawkeye, through Edquist as president, admitted, among other things: (1) It executed the distributorship agreement; (2) it ordered and received appliances and parts pursuant to the agreement, which were sold and shipped to it by NI Industries from March 1984 through May 30, 1984, in the amount of $16,844.41, which amount remained unpaid; and (3) the distributorship agreement was not terminated until NI Industries received the letter from Husker-Hawkeye dated March 25, 1984, on May 26, 1984. The court concluded, based on Neb. Ct. R. of Disc. 36(b) (rev. 1989), that the evidence "conclusively established the distributorship agreement was in full force and effect, that the goods appearing on Exhibit 6 [the inventory list] were ordered pursuant to that agreement and unpaid for."

Rule 36(b) states in part: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Husker-Hawkeye never sought to amend or withdraw its admissions; therefore, Husker-Hawkeye's answers to requests for admissions establish that the distributorship agreement did not terminate on December 31, 1983, as Husker-Hawkeye claims, and continued in effect through May 1984.

Even without such admissions, there is sufficient evidence to support a finding that the distributorship agreement continued in effect as written until it was terminated in May. Both Roach and Bowen testified there was no agreement as alleged by Husker-Hawkeye. Further, Bowen stated neither he nor Roach, the person who allegedly made the agreement with Husker-Hawkeye, had the authority to make such an agreement.

For the foregoing reasons, Husker-Hawkeye's first assignment of error is without merit.

Husker-Hawkeye's second assignment of error claims the trial court erred in awarding prejudgment interest, since there was a dispute as to whether Husker-Hawkeye owed the money and whether Husker-Hawkeye was entitled to any setoff.

The distributorship agreement states: "Any amounts overdue and owing by the Distributor to the Company shall bear interest at the lesser of two (2) percent over the prime rate of interest charged by the main office of the Crocker National Bank, Los Angeles, California, or the maximum rate allowed by law." The parties stipulated to the applicable interest rates from May 30, 1984, until the date of trial.

Prejudgment interest is interest due prior to the rendition of a judgment, pursuant to a statute. Where interest is assessed by reason of an agreement between the parties, the general rules regarding prejudgment interest have no application. *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985).

> "Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable, provided the rate is not unconscionable. Thus, if the

> contract provides for a certain rate of interest until the principal sum is paid . . . the contract governs until the payment of the principal or until the contract is merged in a judgment."

Prudential Ins. Co. v. Greco, 211 Neb. 342, 347-48, 318 N.W.2d 724, 728 (1982), quoting 47 C.J.S. *Interest & Usury* § 40 (1982).

In *First Nat. Bank v. Bolzer, supra*, the trial court granted plaintiff's "Motion to Include Prejudgment Interest" after a jury returned a verdict in favor of plaintiff on a guaranty signed by defendant. The two notes underlying the guaranty bore interest at the rates of 14 percent and 16 percent. In holding the bank was entitled to interest prior to the rendition of judgment, the Supreme Court stated:

> It would be a strange anomaly if, by merely disputing the validity of a note, one was relieved of paying the interest agreed to in the note on the theory that the claim was now unliquidated. Just as the principal was due once the jury believed that Bolzer signed the note, so, too, was due the interest provided for by the note. It is unfortunate that the parties have referred to this as "prejudgment interest" when in fact it is simply the interest contracted for by the parties and agreed to be paid in addition to the principal.

Id. at 422, 377 N.W.2d at 538.

The distributorship agreement between NI Industries and Husker-Hawkeye, which the trial court found remained in effect until May 1984, called for interest at 2 percent above the prime rate charged by Crocker National Bank in California. The interest awarded by the trial court is interest on the contract, rather than "prejudgment" interest as characterized by the court. As such, the court did not err in awarding the interest.

On its cross-appeal, NI Industries first claims the trial court erred in dismissing Edquist as a defendant. The argument in support of this claim rests upon the following requests for admissions:

> 2. On or about March 28, 1983, the plaintiff and defendant Edquist entered into a Distributorship Agreement, *a copy of which is attached to the plaintiff's*

Amended Petition and marked Exhibit "2."

. . . .

4. Pursuant to the said Distributorship Agreement . . . Edquist ordered . . . certain appliances and parts, which were delivered to Edquist.

. . . .

6. That the agreed purchase price of the appliances and parts sold by the plaintiff to Edquist, disregarding any defenses or offsets Edquist may have, which is unpaid amounts to $16,844.41.

. . . .

8. That the unpaid appliances and parts in the amount of $16,844.41 were sold and shipped by the plaintiff to Edquist during a period commencing March, 1984 and ending on or before May 30, 1984.

. . . .

10. That the appliances and parts for which payment has not been made, as referred to in Request Nos. 4 and 6 were received and accepted by Edquist.

. . . .

12. That the plaintiff has made demand on Edquist for the payment of the said sale $16,844.41.

. . . .

14. Edquist has refused to make payment of the said $16,844.41.

(Emphasis supplied.)

NI Industries argues that the answers to these requests for admissions were signed by Edquist in his individual capacity and not as president of Husker-Hawkeye, and, therefore, he is personally liable. It cites in support of this contention the following language from *Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc.*, 193 Neb. 781, 784, 229 N.W.2d 192, 194 (1975): " 'Unequivocal judicial admissions are generally conclusive on the party . . . .' [They are] 'a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.' "

We have no quarrel with this rule of law. However, NI

Industries overlooks the very important word "unequivocal" in that citation and also ignores critical factual discrepancies in the record.

In the first place, the seven cited requests for admissions answered by Edquist are identical with requests numbered 1, 3, 5, 7, 9, 11, and 13 propounded to and answered by Husker-Hawkeye. Furthermore, the distributorship agreement which Edquist's answer No. 2 states was entered into between him and NI Industries does not exist. The amended petition refers in its body only to exhibit 1, and attached to that pleading is only one distributorship agreement. That agreement indicates on the title page that it is a distributorship agreement between NI Industries and Husker-Hawkeye. Furthermore, that agreement is signed by Keith B. Edquist as president of Husker-Hawkeye.

The only conclusion we can reach from the foregoing portion of the record is that exhibit 2, which it is claimed Edquist signed in his personal capacity, simply does not exist. We believe that no better case could be made for a claim of equivocalness.

Furthermore, portions of Edquist's testimony support a finding of equivocal admissions. We refer to the following interrogation:

> Q. Mr. Edquist, how long have you been chief executive officer of Husker-Hawkeye?
>
> A. Nine years.
>
> Q. And during that period of — you were chief executive, did you have occasion to become distributor for Thermador/Waste King?
>
> A. Yes, I did.
>
> . . . .
>
> Q. . . . Who owns the inventory right now?
>
> A. I do.
>
> Q. Who does?
>
> A. Husker-Hawkeye Distributing.
>
> . . . .
>
> Q. Over the years, do you have any idea how many major lines you have distributed or Husker-Hawkeye has distributed?

A. A total of four and we presently still distribute three.

. . . .

Q. . . . Mr. Edquist, have you ever denied that Husker-Hawkeye purchased items from NI Industries during March, April and May of 1984 which were not paid for? . . .

A. No, I have never.

Finally, there are 22 separate invoices which NI Industries includes within its requests for admissions. Each of those invoices of NI Industries indicates that the goods were sold to Husker-Hawkeye and were shipped to Husker-Hawkeye.

Under the facts in this case, the rule regarding judicial admissions simply is not applicable, and the trial court was correct in refusing judgment against Edquist personally.

NI Industries' final assignment of error claims the trial court erred in awarding $2,290 as setoff against the amount due from Husker-Hawkeye. It should be noted that the court actually awarded a setoff in the amount of $1,245 for items Husker-Hawkeye was entitled to return under a "Customer Services Authorization to Return Material" (AR).

At trial, Husker-Hawkeye introduced into evidence two ARs, each for one model No. MCM 255. Attached to the first AR, dated February 22, 1983, is a shipping memorandum showing the merchandise was returned to Thermador/Waste King on July 22, 1983, almost a year before Husker-Hawkeye ceased distributing NI Industries' products. There is nothing in the record to indicate Husker-Hawkeye has not received credit for this return. The second AR is dated December 15, 1983. There is no indication the merchandise listed on the second AR was ever returned.

The inventory list shows one unit of model No. MCM 255 with the notation "missing micro" behind the entry on the page covering damaged merchandise. The price of this particular unit is $1,195.

Taken together, it is clear there is only one item which is entitled to be returned under an AR. There is no indication this merchandise had been returned prior to trial. Edquist stated on cross-examination that Husker-Hawkeye would not be entitled to credit for the AR unless the merchandise had been returned.

The trial court erred in granting setoff in the amount of $1,245 for either AR. The award of the trial court is thus increased by that amount.

For the foregoing reasons the judgment of the trial court is affirmed as modified concerning the setoff for damaged merchandise.

AFFIRMED AS MODIFIED.

JOHN DEERE COMPANY, APPELLEE, V. BOELUS STATE BANK, APPELLANT.

448 N.W.2d 163

Filed November 22, 1989. No. 88-083.

1. **Uniform Commercial Code: Actions: Negotiable Instruments.** A suit on a cashier's check is an action at law.
2. **Actions: Appeal and Error.** The factual findings by the trial court in an action at law have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
3. **Actions: Judgments: Appeal and Error.** In reviewing the judgment in an action at law, the Nebraska Supreme Court does not reweigh the evidence but, instead, considers the judgment in the light most favorable to the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence.
4. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** A cashier's check is a draft drawn by a bank upon itself.
5. **Uniform Commercial Code: Promissory Notes: Words and Phrases.** A draft drawn on the drawer is effective as a promissory note.
6. **Uniform Commercial Code: Negotiable Instruments.** Unless he has the rights of a holder in due course, any person takes the instrument subject to the defense that he or a person through whom he holds the instrument acquired it by theft. Neb. U.C.C. § 3-306(d) (Reissue 1980).
7. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** A holder is a person who is in possession of an instrument drawn, issued, or endorsed to him or to his order or to bearer or in blank. Neb. U.C.C. § 1-201(20) (Reissue 1980).
8. _____: _____: _____. A holder in due course is a holder who takes the instrument (1) for value, (2) in good faith, and (3) without notice that it is

overdue or has been dishonored or of any defense against or claim to it on the part of any person. Neb. U.C.C. § 3-302(1) (Reissue 1980).

9. _____: _____: _____. The payee of an instrument may be a holder in due course.

10. **Uniform Commercial Code: Negotiable Instruments.** A holder takes an instrument for value when he takes the instrument in payment of an antecedent claim against any person.

11. _____: _____. Subsequent knowledge of an alleged infirmity does not impair the status of a holder in due course.

Appeal from the District Court for Howard County: WILLIAM H. RILEY, Judge. Affirmed.

Galen E. Stehlik for appellant.

Lynn A. Mitchell, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This is a suit by the plaintiff, John Deere Company, against the Boelus State Bank on a cashier's check issued by the defendant bank and payable to the plaintiff. The trial court found that the plaintiff was a holder in due course and entitled to recover $8,455.85. The defendant has appealed and contends that the trial court erred in finding for the plaintiff because there was evidence of an affirmative defense under Neb. U.C.C. § 3-305(2) (Reissue 1980), and in finding that the plaintiff was a holder in due course because the instrument in question was never "issued" within the meaning of the Nebraska Uniform Commercial Code.

Since a suit on a cashier's check is an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Heese Produce Co. v. Lueders, ante* p. 12, 443 N.W.2d 278 (1989). In reviewing the judgment, we do not reweigh the evidence but, instead, consider the judgment in the light most favorable to the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989).

Taking the view of the evidence most favorable to the

plaintiff, the record shows that on October 8, 1982, Walter Duester entered into a "variable rate loan contract security agreement" in connection with the purchase of a John Deere combine and grain platform from St. Paul Equipment, Inc. (St. Paul). John Deere was the lender and secured party under the agreement, and the combine was pledged as collateral. When Duester failed to pay the balance of his contract ($8,455.84) by January 1986, the manager of St. Paul was instructed to repossess the combine.

On January 14, 1986, Randy Hansen, an employee of St. Paul, went to Duester's farm to repossess the combine. Duester told Hansen that he had received some payments for custom combining and would purchase a cashier's check and pay the debt to John Deere. Hansen followed Duester to the defendant bank at about 11 a.m. and waited outside for Duester to return.

Five or ten minutes later, Duester came out of the bank and gave Hansen a cashier's check in the amount of $8,455.84. The check was drawn on defendant Boelus State Bank, payable to the order of John Deere Company, and was signed by an authorized bank employee, Judy Jensen.

Hansen returned to St. Paul without repossessing the combine and delivered the cashier's check to the comptroller for St. Paul. About 1 hour later, Russell Jensen, the bank president, telephoned St. Paul and stated that the bank might not honor the check.

On or about January 22, 1986, John Deere presented the cashier's check for payment, but payment was refused.

A cashier's check is a draft drawn by a bank upon itself. *Pulaski Chase v. Kellogg-Citizens Bank*, 130 Wis. 2d 200, 386 N.W.2d 510 (1986). Neb. U.C.C. § 3-118(a) (Reissue 1980) provides that a draft drawn on the drawer is effective as a note. See, also, *Thompson Poultry, Inc. v. First Nat. Bank of York*, 199 Neb. 8, 255 N.W.2d 856 (1977) (a bank money order is essentially the same as a cashier's check and is equivalent to a negotiable promissory note of the bank); *TPO Incorporated v. Federal Deposit Insurance Corp.*, 487 F.2d 131 (3d Cir. 1973).

As the court in *Banco Ganadero y Agricola, Etc. v. Soc. Nat. Bk., Cleve.*, 418 F. Supp. 520, 524 (N.D. Ohio 1976), observed:

> Treating a cashier's check as the bank's promissory

> note, the question becomes not whether the bank may stop payment thereon—for stopping payment only makes sense as a concept where a drawer wishes to prevent the drawee, another party, from paying the instrument—but rather whether the bank, as maker of the instrument, is liable thereon. Therefore, it is concluded that a cashier's check drawn by a bank on itself is more accurately treated as a note than as an "accepted" check.

See, also, *Pulaski Chase v. Kellogg-Citizens Bank, supra*; 1 J. White & R. Summers, Uniform Commercial Code § 14-10 at 736 (3d ed. 1988).

Neb. U.C.C. § 3-413(1) (Reissue 1980) provides that the maker of a note "engages that he will pay the instrument according to its tenor at the time of his engagement . . . ." See, also, *Grand Island Prod. Credit Assn. v. Humphrey*, 223 Neb. 135, 388 N.W.2d 807 (1986).

Neb. U.C.C. § 3-307 (Reissue 1980) provides:

> (1) Unless specifically denied in the pleadings each signature on an instrument is admitted. . . .
>
> . . . .
>
> (2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.
>
> (3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

In *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 666-67, 234 N.W.2d 902, 903 (1975), this court stated:

> The answer does not specifically deny the signatures. Under such circumstances the signatures are admitted and the holder of the notes is entitled to recover on them unless the defendants establish a defense. [Citations omitted.] The burden is upon the defendants to plead and prove such defense.

See, also, *Blaha GMC-Jeep, Inc. v. Frerichs*, 211 Neb. 103, 317 N.W.2d 894 (1982); *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981).

In its answer, the bank generally denied the allegations of the

petition and made the following allegations concerning affirmative defenses:

> 4. That on or about December 30, 1985, the Directors of the Boelus State Bank resolved that two signatures would be required on all Cashier's Checks issued by the Boelus State Bank. . . .
>
> 5. That on or about January 14, 1986, the Boelus State Bank was requested to issue a Cashier's Check payable to the order of John Deere Company in the amount of $8,455.85 [sic] by Melvin [sic] Deuster [sic].
>
> 6. That the teller who was waiting on Mr. Deuster [sic] stated that she would need a second signature on the check and excused herself to request a loan officer to come to the front counter to sign the check.
>
> 7. That when the teller returned with the loan officer, the check as well as Mr. Deuster [sic] had left the bank.
>
> 8. That immediately the loan officers, Russell Jensen and Andrew Jensen, personally contacted Mr. Deuster [sic] to inform him that the Cashier's Check was invalid because it did not have two signatures. Mr. Deuster [sic] stated he had already given the check to John Deere Company.
>
> 9. Loan officer, Russell Jensen, immediately thereafter contacted John Deere Company informing them that the check was invalid because it did not have two signatures.
>
> 10. That the above stated Cashier's Check was never officially issued, and therefore it could not be honored upon presentation by John Deere Company.

Since the bank did not specifically deny that the signature on the check was valid, see § 3-307, comment 1, the signature was admitted, and the plaintiff was entitled to recover unless the bank established a defense. If the bank established a defense, then the plaintiff had the burden of proving that it was a holder in due course. See *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983).

Neb. U.C.C. § 3-306 (Reissue 1980) provides:

> Unless he has the rights of a holder in due course any person takes the instrument subject to
>
> . . . .

(c) the defenses of want or failure of consideration, nonperformance of any condition precedent, nondelivery, or delivery for a special purpose . . . and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft . . . .

Section 3-305 provides:

To the extent that a holder is a holder in due course he takes the instrument free from

. . . .

(2) all defenses of any party to the instrument with whom the holder has not dealt except

. . . .

(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity

. . . .

Although the bank alleged that Duester had acquired the cashier's check by theft and that the check had not been delivered, if the plaintiff was a holder in due course it is unnecessary to consider the defenses alleged by the bank.

"A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." Neb. U.C.C. § 3-302(1) (Reissue 1980). In this case the check had been drawn payable to the order of the plaintiff, John Deere. A holder is defined as a "person who is in possession of . . . an instrument . . . *drawn*, issued or indorsed to him or to his order or to bearer or in blank." (Emphasis supplied.) Neb. U.C.C. § 1-201(20) (Reissue 1980).

The payee of an instrument may be a holder in due course if he meets the requirements of § 3-302. Section 3-302 and comment 2 thereto. A holder takes an instrument for value when he takes the instrument in payment of an antecedent claim against any person. Neb. U.C.C. § 3-303(b) (Reissue 1980).

The record shows that John Deere was in possession of the cashier's check drawn on the defendant bank and which was payable to the order of John Deere. In obtaining the cashier's check, John Deere did not deal with the bank, and took the instrument in payment of the debt due it from Duester. There

was no defect apparent on the face of the instrument. Duester did not tell Hansen what had happened while he was in the bank, did not tell Hansen that there might be a problem with the cashier's check, and did not discuss the subject of his bank loan with anyone from St. Paul. The record supports the trial court's conclusion that John Deere's agent, Hansen, had no knowledge of any defense against the instrument when he received the cashier's check in payment of Duester's debt to St. Paul. Although John Deere subsequently was informed that the bank intended to dishonor the check, subsequent knowledge of an alleged infirmity does not impair its holder in due course status. *Schranz v. I. L. Grossman, Inc.*, 90 Ill. App. 3d 507, 412 N.E.2d 1378 (1980); *Lynnwood Sand & Gravel v. Bank of Everett*, 29 Wash. App. 686, 630 P.2d 489 (1981). The trial court's finding that John Deere was a holder in due course was not clearly wrong.

Since the plaintiff was a holder in due course, it is unnecessary to discuss the evidence relating to the bank's claim that the check had been stolen by Duester. Under § 3-306, a holder in due course takes the instrument not subject to "the defense that he or a person through whom he holds the instrument acquired it by theft . . . ."

In § 3-306, comment 5, it is stated: "The exception made in the case of theft is based on the policy which refuses to aid a proved thief to recover, and refuses to aid him indirectly by permitting his transferee to recover *unless the transferee is a holder in due course*." (Emphasis supplied.) See, also, *O.P. Ganjo, Inc. v. Tri-Urban Realty Co., Inc.*, 108 N.J. Super. 517, 261 A.2d 722 (1969).

The judgment is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF MAUDE CLEVENGER SIM.
MAUDE CLEVENGER SIM ET AL., APPELLANTS, V. EDITH WRIGHT AND OPAL C. COMISKEY, APPELLEES.

448 N.W.2d 406

Filed November 22, 1989. No. 88-216.

Courts: Motions for New Trial: Judgments: Time: Appeal and Error. A motion for new trial or rehearing is not authorized when the district court sits as an appellate court reviewing the judgment of the county court, and such motion therefore does not toll the time for appealing to the Nebraska Supreme Court; the time for such appeal begins to run from the date the district court rules on the judgment of the county court.

Appeal from the District Court for Otoe County, RAYMOND J. CASE, Judge, on appeal thereto from the County Court for Otoe County, ALBERT C. WALSH, Judge. Appeal dismissed.

Harvey A. Neumeister and Kent J. Neumeister, and J. Patrick Green for appellants.

Alan M. Wood, of Bailey, Polsky, Cada, Todd & Cope, guardian and conservator.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In accordance with *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987), the county court appointed attorney Alan M. Wood as guardian and conservator of Maude Clevenger Sim, with limited powers. Sim appealed that appointment to the district court, which, on December 8, 1987, affirmed the judgment of the county court and assessed costs against the attorneys representing Sim for acting in bad faith. On December 18, 1987, Sim alone filed a motion for "new trial or rehearing," which the district court overruled on February 3, 1988. On March 3, 1988, Sim and her attorneys filed their joint purported notice of appeal to this court. If Sim's motion for new trial or rehearing was inappropriate, the notice of appeal was clearly filed out of time with respect to all rulings of the district court. Neb. Rev. Stat. § 25-1912 (Cum.

Supp. 1988) provides that in the absence of a motion for new trial, the notice of appeal to this court must be filed within 30 days from the district court's ruling on the judgment of the county court.

We have held that a motion for new trial is proper only in a trial court. Accordingly, such motion is not properly presented to the district court where it sits as an intermediate appellate court and merely reviews the county court judgment. *Collection Bureau of Lincoln v. Loos, ante* p. 30, 443 N.W.2d 605 (1989). Neither is there authorization for a motion for rehearing in such circumstances. Therefore, a motion for new trial or rehearing is not authorized when the district court sits as an appellate court reviewing the judgment of the county court, and such motion therefore does not toll the time for appealing to this court; the time for such appeal begins to run from the date the district court rules on the judgment of the county court.

Accordingly, this purported appeal is dismissed for want of jurisdiction.

APPEAL DISMISSED.

GENE L. BABB, APPELLANT AND CROSS-APPELLEE, V. UNITED FOOD AND COMMERCIAL WORKERS DISTRICT UNION, LOCAL 271, APPELLEE AND CROSS-APPELLANT.

448 N.W.2d 168

Filed November 22, 1989. No. 88-272.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Contracts: Arbitration and Award: Public Policy.** Arbitration agreements entered into before a dispute arises which purport to deny the parties the right to resort to the courts nonetheless oust the courts of their jurisdiction and are thus against public policy and therefore void and unenforceable.
3. **Employer and Employee: Wages.** The Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984), does not apply to

severance payment which becomes due upon termination of employment.

4. **Arbitration and Award: Proof.** An arbitration award, whether under the statute or common law, is, in the absence of fraud or mistake, prima facie binding on the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to set aside the decision.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Soren S. Jensen and J Russell Derr, of Erickson & Sederstrom, P.C., for appellant.

Thomas F. Dowd for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from an order of the district court for Douglas County granting the motion for summary judgment of defendant, United Food and Commercial Workers District Union, Local 271, on plaintiff Gene L. Babb's petition for severance pay in the first cause of action and damages for breach of contract in the second cause of action.

Babb's claims are based on a contract of merger between United Food and Commercial Workers Union, Retail Clerks Local 1015 (Local 1015) and United Food and Commercial Workers Union, District Union Local 271 (Local 271), and on the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984).

On February 29, 1988, the district court found that Babb's claims under state law were preempted by federal law, § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1982) (hereafter LMRA § 301). The court held that pursuant to LMRA § 301, Babb had failed to exhaust the required remedy of arbitration under the merger agreement regarding his first cause of action, and with regard to his second cause of action, Babb exercised his remedy of arbitration but received an adverse decision which is final and binding on the merits. Babb's three assignments of error may be summarized in his allegation that the trial court erred in sustaining defendant's

motion for summary judgment and determining that Babb's state law claim is preempted by federal law, specifically LMRA § 301.

The record shows that pursuant to a merger agreement executed on August 12, 1983, Local 1015 and Local 271 merged to become one local union operating under the name "United Food and Commercial Workers District Union, Local 271" (hereafter successor union). The merger became effective September 1, 1983.

Babb, as president of Local 1015 at the time of the merger, executed the agreement on behalf of Local 1015. Upon commencement of the merger, Babb was installed as secretary-treasurer of the successor union pursuant to the merger agreement, and he also had organizing duties as a business agent for the successor union. Babb's salary as president of Local 1015 was $628 per week at the time of the merger, and then he received $620 plus a $20 officer allowance per week from the successor union after the merger. The parties dispute whether the postmerger salary is for compensation as secretary-treasurer or as business agent.

Babb continued in this dual capacity until he was notified in a letter dated February 22, 1985, from the successor union president, Robert Parker, that his employment would be terminated effective March 15. Babb then looked to the merger agreement for redress. Paragraph XI(A) of the agreement states:

> In the event of any dispute or controversy arising out of or under this Merger Agreement, such dispute or controversy shall be submitted to the UFCW International Executive Committee. The decision of the International Executive Committee on the disputed matter shall be final and conclusive on all parties and may be enforced in any court of competent jurisdiction.

In a letter dated March 19, 1985, to the international union president, William H. Wynn, Babb invoked the arbitration procedure of the merger agreement regarding the termination of his employment. Babb received an adverse ruling in a letter from the international union dated January 15, 1986. In upholding the termination, the arbitrators found that Babb was

salaried as an appointed business agent of the successor union, and not by virtue of holding the office of secretary-treasurer. They further found that Babb's employment was not guaranteed in any other way.

Babb retained the nonsalaried office of secretary-treasurer until December 31, 1985, which was the expiration of his term, as stated in the merger agreement.

Babb then sent an August 4, 1986, letter to President Parker requesting severance pay in the amount of 2 weeks' pay for each year of employment. Babb's union employment totaled 19 years. Babb based this request on the adoption of a severance pay policy for officers by the executive board of Local 1015 at an April 13, 1983, board meeting. The request was further based on the alleged assumption of this obligation by the successor union under sections V and VIII of the merger agreement. These sections, in pertinent part, state:

> V. Employees
>
> (A) On the effective date of the merger, the employees of Locals 271 and 1015 shall become employees of the Merged Organization without interruption of their employment status.
>
> . . . .
>
> VIII. Rights, Property and Obligations of Merged Organization
>
> (A) . . . The Merged Organization shall, on and after the effective date of the merger, assume and be responsible for all the debts, liabilities, contract obligations, and other obligations of District Union Local No. 271 and UFCW Local No. 1015. Such debts, liabilities, contract obligations, and other obligations shall from that time forth attach to the Merged Organization to the same extent as if the said debts, liabilities, contract obligations, and other obligations were incurred or otherwise contracted by it.

President Parker stated in a reply dated August 11, 1986, that it was his opinion that Babb had no severance pay due him from the successor union, but Parker said that he had referred the matter to the international union for review. This letter is the last correspondence in the record concerning the severance

pay issue.

Babb then filed this suit in the district court for Douglas County on November 18, 1986.

SCOPE OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

LMRA § 301 PREEMPTION

LMRA § 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

§ 185(a).

The court below presumably applied federal law because Babb based his claim on a contract "between any such labor organizations." However, a review of decisions involving application of LMRA § 301 reveals that federal law does not necessarily apply simply because there is a contract between labor organizations.

It has been held that a constitution of a labor union is not a "contract" within the purview of the statute conferring federal jurisdiction over suits for violation of contracts between labor organizations representing employees in industry affecting commerce in an intraunion dispute unrelated to a collective bargaining agreement or to union affairs having no connection with industrial and economic peace. *1199 DC, Nat. U. of H. & H. C. E. v. National U. of H. & H. C. E.*, 394 F. Supp. 189 (D.D.C. 1975), *aff'd in part and in part rev'd* 533 F.2d 1205 (D.C. Cir. 1976). See, also, *Keck v. Employees Independent Association*, 387 F. Supp. 241 (E.D. Pa. 1974).

The clear gist of the decisions is that LMRA § 301 applies

only in the interpretation of a collective bargaining agreement, where the contract deals with employee representation, or where the dispute has some connection with industrial and economic peace between labor and management.

For example, in *Fredericks v. Pa. Soc. Serv. Union, Local 668*, 410 F. Supp. 1063 (W.D. Pa. 1976), an individual nonmember of a union sued the union for breach of an alleged oral agreement to employ him as executive director of the union, and the union removed the action from state court to federal district court. In granting a motion to remand the case to state court, the federal court cited the aforementioned proposition that the dispute have some connection with industrial and economic peace, and further stated:

> It is obvious that, here, no connection is constructible. There is no collective bargaining agreement here; neither is the plaintiff claiming that the defendant Union is not representing his rights before an employer. What is before me now is an individual dispute between two parties as to the validity of an alleged oral employment agreement between them. Certainly members of the defendant Union will not be adversely affected in the realm of employer-employee relations by the result of an adjudication here, or elsewhere.

Fredericks, supra at 1065. See, also, *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988) (LMRA § 301 held not to apply in this action for wrongful termination).

As in *Fredericks*, it appears to us, there is no connection in the instant case with industrial or economic peace. The merger agreement upon which Babb bases his claim is obviously not a collective bargaining agreement, and this case has nothing to do with the successor union's representing Babb. At the heart of this matter is an action against an employer for breach of an alleged guarantee of employment, and an action for breach of a provision of the merger agreement. That two labor unions were parties to the agreement which is alleged to have been breached merely clouded the basic issues.

In following the U.S. Supreme Court's holding in *Lingle, supra*, that an application of state law is preempted by LMRA

§ 301 only if such application requires the interpretation of a collective bargaining agreement, we hold that LMRA § 301 does not preempt the decision of this case under state law. The order of the trial court granting summary judgment is therefore vacated.

FIRST CAUSE OF ACTION

Babb's first cause of action claims that the successor union is in violation of the Nebraska Wage Payment and Collection Act, §§ 48-1228 et seq., in withholding the severance pay that is allegedly due him by virtue of the merger agreement. The successor union asserts that Babb is required by the agreement to submit this claim to binding arbitration and cannot bring this action in our courts.

Arbitration agreements entered into before a dispute arises which purport to deny the parties the right to resort to the courts nonetheless oust the courts of their jurisdiction and are thus against public policy and therefore void and unenforceable. *Rawlings v. Amco Ins. Co.*, 231 Neb. 874, 438 N.W.2d 769 (1989); *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985). The arbitration provision in the merger agreement is just such an unenforceable agreement, and Babb cannot be excluded from the courts by virtue of it.

We have also held that the Nebraska Wage Payment and Collection Act applies only to actions to recover wages due the employee for labor or services performed for the employer. The act does not apply to severance payment which becomes due upon termination of employment. *Heimbouch v. Victorio Ins. Serv., Inc.*, 220 Neb. 279, 369 N.W.2d 620 (1985).

Although the act is inapplicable to this claim, Babb may still have a common-law cause of action for breach of contract. The record shows that issues exist regarding the adoption and rescission of the severance pay policy by Local 1015, and whether a contractual obligation for the successor union to pay Babb severance pay arose under the merger agreement.

SECOND CAUSE OF ACTION

Although an agreement to arbitrate future disputes is unenforceable, the agreement between Babb and the successor

union to submit the termination issue to arbitration was voluntary and arose after the dispute.

Babb voluntarily requested and invoked the arbitration procedure of the merger agreement in his March 19, 1985, letter to the international union. He was not forced to arbitrate by the successor union. The successor union acquiesced in Babb's invocation of the arbitration process.

An award, whether under the statute or common law, is, in the absence of fraud or mistake, prima facie binding on the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to set aside the decision. The general policy of the courts is that an arbitration award should not be set aside as inequitable unless it is grossly excessive and shocks the conscience of the court. *Simpson v. Simpson*, 194 Neb. 453, 232 N.W.2d 132 (1975).

The petition does not allege either fraud or mistake in the arbitration process, and the record does not demonstrate any issue of fact as to fraud or mistake.

The district court was correct in its determination that the arbitration decision is final and binding; however, the court erred in applying federal law to arrive at its determination. State law is properly applied to Babb's second cause of action, and pursuant thereto, we find that the arbitrator's decision is binding on the parties.

CONCLUSION

The successor union's cross-appeal for an attorney fee pursuant to the Nebraska Wage Payment and Collection Act is rendered moot, as the act is not applicable to this case. The order of the district court granting summary judgment is reversed as to Babb's first cause of action, and the cause is remanded for trial on that issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER F. VAN EGMOND, APPELLANT.

448 N.W.2d 569

Filed November 22, 1989. Nos. 88-1077, 88-1078.

1. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for commission of a criminal offense.
2. **Criminal Law: Entrapment.** Entrapment occurs when the criminal intent or design originates with governmental officials, who implant in the mind of an innocent person the disposition to commit a criminal offense and induce criminal conduct in order to prosecute the criminal offense so induced.
3. _____: _____. When a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment.
4. **Criminal Law: Entrapment: Intent.** Nebraska has adopted the "origin of intent" test for entrapment. Under this test, a defendant has been entrapped if (1) an agent of the State has induced the defendant to commit the offense charged, and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
5. **Entrapment: Proof.** The State has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.
6. **Criminal Law: Entrapment: Police Officers and Sheriffs.** Law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

S.J. Albracht for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Christopher F. Van Egmond, was charged in separate informations with conspiracy to distribute methamphetamine and possession of methamphetamine with

intent to distribute. The cases were consolidated for trial, and the jury returned a verdict of guilty on both counts. The defendant was sentenced to imprisonment for 3 to 5 years on each count, the sentences to run concurrently.

The defendant has appealed and contends that the trial court erred in failing to sustain his motion for a directed verdict of acquittal because the evidence sustained the defense of entrapment as a matter of law. The defendant stipulated that he had engaged in a conspiracy to distribute a controlled substance and that he had delivered methamphetamine on July 10, 1986, in Dakota County, Nebraska.

Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for commission of a criminal offense. *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Jones*, 231 Neb. 47, 435 N.W.2d 167 (1989). It occurs when the criminal intent or design originates with governmental officials, who implant in the mind of an innocent person the disposition to commit a criminal offense and induce criminal conduct in order to prosecute the criminal offense so induced. *Byrd, supra*; *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984). When a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. *State v. Lampone*, 205 Neb. 325, 287 N.W.2d 442 (1980).

Nebraska has adopted the "origin of intent" test for entrapment. Under this test, a defendant has been entrapped if (1) an agent of the State has induced the defendant to commit the offense charged, and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *Byrd, supra*; *Jones, supra*; *Swenson, supra*. The State has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. *Jones, supra*.

The record shows that on July 10, 1986, the defendant conspired to deliver and did deliver methamphetamine to Allen Keck, a confidential informant for the Nebraska State Patrol, in Dakota County, Nebraska.

The defendant and Keck first met in March 1986, while they were patients at the Valley Hope drug treatment center in O'Neill, Nebraska. They became acquainted during group therapy sessions and exchanged addresses and telephone numbers at Valley Hope. Keck had been addicted to methamphetamine and was a patient at Valley Hope because he was trying to reach a plea agreement with federal prosecutors regarding his indictment for approximately seven drug- and weapons-related offenses. In December 1985, Keck pled guilty to two counts of felony conspiracy, pursuant to the plea agreement, and wanted to do anything he could to lessen his potential sentences for the federal convictions.

Keck was a contractor and also was active in racing horses. After Keck left Valley Hope, he tried to renew his racing license in Nebraska, but failed to mention on the renewal application that he was under federal indictment. Accordingly, the Nebraska State Racing Commission decided to revoke Keck's license. Facing the loss of his license, Keck met with State Patrol Officer Bill Schlachter in Grand Island during May 1986 and offered to help the State Patrol investigate the sale of drugs at Nebraska racetracks.

Keck testified that Schlachter agreed to intervene regarding Keck's racing license if Keck would "go ahead and help them clean up some of that mess up there as far as the drugs on the race track." Keck was directed to meet with the State Patrol in Omaha.

Keck met with State Patrol officers and a member of the racing commission in Omaha in mid-June 1986. The purpose of the meeting was to determine whether Keck would work with the State Patrol and whether he would be valuable as an informant. Keck signed an informant's agreement on June 19, 1986, and was assigned to work with State Patrol Investigator Robert Shelbourn, a drug investigator.

Shelbourn testified that there was no ongoing investigation of the defendant when Keck signed the informant's agreement and that the State Patrol intended to use Keck as an informant on and around racetracks in Dakota County and Columbus. No promises were made to Keck on June 19, except that the State Patrol would notify the U.S. Attorney's office and the

federal court of Keck's cooperation. Keck was not paid a salary and began working as an informant only after signing the agreement on June 19.

Approximately 1 week later, Keck and Shelbourn had a casual conversation during which Shelbourn said that he was from Plainview, Nebraska. Keck stated that he knew someone from Plainview (the defendant) and that he had gone through drug treatment with the defendant. Shelbourn asked Keck if he thought he could buy any drugs from the defendant. Keck believed he could because during treatment the defendant had told Keck that he had access to methamphetamine. Keck also knew that the defendant was in "pretty poor" financial shape and did not think he would have any problems buying drugs from the defendant.

On July 1, 1986, Keck telephoned the defendant and went to the defendant's home near Plainview that afternoon. This was the first time Keck had seen the defendant since treatment at Valley Hope. During a conversation in the defendant's living room, Keck asked if the defendant could get any methamphetamine, or "crank." The defendant and Keck went outside to a machine shed, where Keck again asked the defendant if he could get any crank. The defendant said yes, produced a small bag of crank, snorted some, and asked Keck if he wanted any. Keck said he was not going to "do it," but wanted to sell it. The defendant told Keck that he would obtain a quarter ounce and that he would return around 7 or 8 p.m.

Keck notified Shelbourn of his arrangement with the defendant. Keck returned to the defendant's residence on the evening of July 1. He and the defendant went to the shed. The defendant gave Keck a quarter ounce of methamphetamine and told Keck it would cost $500. Keck then gave the defendant $500, and the two men walked to Keck's truck.

Keck told the defendant that he would "get rid of this" crank and would call the defendant when he needed more. They agreed that the defendant would obtain a quarter ounce of methamphetamine if Keck telephoned and said he was "working on a one horse trailer and couldn't get away."

A few days later, Keck telephoned the defendant from South Sioux City and mentioned the "one horse trailer." During this

conversation, the defendant indicated that he was coming to South Sioux City to take his wife to the hospital for back surgery and would deliver a quarter ounce of methamphetamine to Keck at Keck's home.

The defendant arrived at Keck's residence on the afternoon of July 10. Keck asked him if he had the crank. The defendant said that he did and that he had brought a half ounce because the supply was running low. The defendant left the residence and returned with a white envelope containing a quarter ounce of crank. Keck paid the defendant $500 for the methamphetamine and $50 for travel expenses.

The July 1 and July 10 transactions were monitored by the Nebraska State Patrol. On both occasions, the defendant informed Keck of the price of the drug. Keck testified that he did not threaten the defendant in any way and that the defendant did not resist or seem reluctant to sell the methamphetamine to Keck.

The defendant called no witnesses and did not testify at the trial.

Although the defendant argues that his motion to dismiss should have been sustained because there was "not a scintilla of evidence that the Defendant had any predisposition to violate the law by the delivery of Methamphetamines," the record supports the jury's finding that the State Patrol did not induce the defendant to sell methamphetamine. Rather, the informant merely inquired of the defendant as to whether the informant could purchase the drug. This inquiry was met with an immediate positive response on two occasions. On the second occasion, the defendant even offered to supply Keck with twice as much methamphetamine as had been agreed to.

Furthermore, by agreeing to sell the drug upon the simple request of an informant, the defendant demonstrated that he was willing to commit the offense on any propitious opportunity. The jury resolved the issue of entrapment against the defendant, and the verdicts are supported by the evidence.

Although the defendant appears to argue that the State Patrol's use of an informant was unfair, especially because the informant had participated in a drug treatment program with the defendant, we have stated that

> law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it.

State v. Lampone, 205 Neb. 325, 328, 287 N.W.2d 442, 444 (1980). The defendant's assignments of error are without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY C. PORTSCHE, APPELLANT.
448 N.W.2d 173

Filed November 22, 1989. No. 89-154.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

James H. Hoppe, of Watkins, Scott, Hoppe, for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from an order denying postconviction relief by the district court for Lancaster County.

A single ground was urged in the district court and is again asserted in this court, i.e., the appellant was denied effective assistance of counsel when retained counsel failed to timely file a notice of appeal to the Supreme Court after the district court imposed a sentence on August 22, 1988. The trial court, after a hearing, denied any relief. We affirm.

Appellant pled guilty to a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988), operation of a motor vehicle while

the operator's license was suspended for 15 years, a Class IV felony. As part of a plea bargain a number of misdemeanor charges were dismissed, the record indicating at least three. The court sentenced appellant to a term of from 12 to 18 months in the penal complex, with credit for 9 days' jail time.

No complaint was made in the district court or this court about any deficiency in the performance of counsel. The appellant, however, asserts that he was "shocked" by the sentence.

At the postconviction hearing, appellant asserted that retained counsel promised to timely file a notice of appeal, but did not do so. However, he conceded that at a later meeting retained counsel stated that an appeal would be frivolous and that he would not represent appellant on appeal.

Trial counsel also testified that he informed appellant that he would not represent him on appeal, that in his opinion an appeal was frivolous, and that he was never instructed, nor did he promise, to file an appeal. He further instructed appellant, should he determine to appeal, how to address the court for appointment of counsel on appeal, proceeding in forma pauperis, and about the necessity of filing the notice of appeal within 30 days of the date of sentence.

The trial court resolved the factual dispute against the appellant, and this alone requires an affirmance, as we are bound by the factual findings in a postconviction proceeding having support in the record. *State v. Wiley*, 232 Neb. 642, 441 N.W.2d 629 (1989). It should also be noted that a sentence within the bounds of the statute will not be disturbed on appeal absent an abuse of discretion. *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989).

As the only error that could have been raised on appeal was the alleged excessiveness of the sentence, and considering the extensive history of driving offenses (at least 28 contacts), it is obvious that appellant cannot demonstrate that any prejudice was suffered by any alleged claim of incompetent counsel. See *State v. Broomhall*, 227 Neb. 341, 417 N.W.2d 349 (1988).

The trial court correctly denied the appellant's claim for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST HARPER, APPELLANT.

448 N.W.2d 407

Filed November 22, 1989. No. 89-235.

Postconviction. The Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Appeal dismissed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Ernest Harper, pro se.

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

The defendant, Ernest Harper, has appealed from an order of the district court which denied him an evidentiary hearing and denied defendant's postconviction motion filed December 22, 1988. In 1982, in the district court for Douglas County, Nebraska, defendant was convicted of robbery, use of a firearm in the commission of a felony, and two counts of first degree sexual assault. His convictions of those crimes were affirmed in *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983). Thereafter, defendant filed two unsuccessful petitions for postconviction relief. Denial of such relief was affirmed in *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984), and *State v. Harper*, 225 Neb. 300, 404 N.W.2d 436 (1987).

On December 22, 1988, defendant filed a "Motion for Stay and Direct Review of Extradition Agreement and Judgment and Plimanary Injuncation [sic]" in the Douglas County District Court. In his motion, defendant alleges that "[u]nder the Iowa State Extradition Compact, the demanding State of Nebraska had no legal authorization to transpotate [sic] defendant from the asylum state." Defendant then sets out in

his motion various sections of Iowa statutes concerning extradition. He does not refer to the Agreement on Detainers, as reflected in Neb. Rev. Stat. § 29-759 (Reissue 1985), but generally alleges that that interstate compact violates the Nebraska, Iowa, and U.S. Constitutions. On March 9, 1989, the district court denied defendant's motion.

On March 10, 1989, defendant filed an "Amendment to Motion to Vacate" in the district court. The trial court, on March 15, determined that defendant's March 10 amendment was untimely, since the original motion had been denied. The trial court, however, "in an effort to avoid further pleadings," treated the amendment as a motion to vacate and thus a postconviction motion, and denied it as being without merit, since all the alleged grounds could have been raised on direct appeal. The trial court, in effect, denied all of defendant's efforts seeking postconviction relief.

We agree with the court's resolution of defendant's motions, but on a different ground. Our examination of the record shows that at all times while any of the motions in the case before us were filed, defendant was incarcerated in the State of Iowa. Defendant's affidavit attached to his first motion establishes beyond a doubt that defendant is so incarcerated. Postconviction proceedings in Nebraska are set out in Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1985). Section 29-3001 provides, in part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the ground relied upon, and asking the court to vacate or set aside the sentence.

The underlying facts of this appeal require an answer to the question as to what constitutes "in custody under sentence." It is undisputed that the defendant filed this motion for postconviction relief while incarcerated in an Iowa prison. While § 29-3001 does not expressly state that a postconviction

attack on a sentence is limited to prisoners incarcerated in the State of Nebraska, we hold that the phrase "in custody under sentence," as used in the Nebraska Postconviction Act, §§ 29-3001 et seq., requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.

This holding is harmonious with article V(g) of the Agreement on Detainers, § 29-759, which provides: "For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state . . . ."

Defendant remains subject to the jurisdiction of the sending state, which in this case is the State of Iowa. Nebraska had only temporary custody of the defendant, and that custody terminated when the defendant was delivered back to Iowa. Defendant is now in the actual custody of the State of Iowa. The State of Nebraska can do nothing about that custody. Since, at this time, defendant is not in actual custody in Nebraska, he may not mount a statutory postconviction attack against his Nebraska convictions.

The district court did not have jurisdiction to entertain defendant's motions for postconviction relief, and his motions should have been dismissed on that ground. Defendant's appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. BRYAN L. MENTZER, APPELLANT.
448 N.W.2d 409

Filed November 22, 1989. No. 89-772.

1. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
2. **Criminal Law: Pleas: Restitution.** The failure to inform a defendant of the

possibility of restitution renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution.

3. **Pleas: Proof.** While in order for a defendant to enter a voluntary and intelligent plea of guilty, he or she must know the penalty for the crime to which he or she is pleading, and although it is preferable that such knowledge be imparted by the judge accepting the plea, it is nonetheless possible to prove the defendant's knowledge by other means.
4. **Sentences: Appeal and Error.** The Nebraska Supreme Court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

James H. Truell, York County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

As the result of a plea bargain whereunder plaintiff-appellee State dismissed six other charges, the defendant-appellant, Bryan L. Mentzer, pled nolo contendere to having possession of a controlled substance, methamphetamine, in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1988), and to second offense driving while intoxicated, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). He was thereafter adjudged guilty of those charges. On the possession conviction, Mentzer was sentenced to imprisonment for a period of not less than 20 months nor more than 5 years. On the driving while intoxicated conviction, he was sentenced to a consecutive term of imprisonment for a period of 1 month and to revocation of his operator's license for a period of 1 year, and was ordered to make restitution in the sum of $300. Mentzer assigns as error only the claim that the district court erred by imposing excessive sentences. We affirm in part and in part vacate and remand for resentencing.

The possession conviction is a Class IV felony. § 28-416; Neb. Rev. Stat. § 28-405 [Schedule II(c)(3)] (Cum. Supp. 1988). As such, it is punishable by imprisonment for a period of zero to 5 years, a $10,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. § 28-105 (Reissue 1985). The driving while intoxicated conviction is a Class W misdemeanor, for which the mandatory punishment is imprisonment for a period of 30 days, a $500 fine, and revocation of the convict's operator's license for a period of a year. Neb. Rev. Stat. § 28-106 (Cum. Supp. 1988); § 39-669.07. In addition, the district court was authorized to require Mentzer to make restitution for the damage he caused by driving while intoxicated. Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1988).

The rule controlling disposition of Mentzer's assignment of error is that an order denying probation and imposing a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989). Nonetheless, Mentzer urges he should have been placed on probation because he has kept himself relatively free of encounters with police authorities since his release from prison in 1976. However, this argument overlooks that this is the second time since 1983 that Mentzer has been convicted for driving while intoxicated and that his earlier period of imprisonment, for burglary and robbery, has obviously not yet taught him to refrain from the criminal activity of possessing controlled substances. It therefore cannot be said that the district court abused its discretion in not placing Mentzer on probation.

Although not assigned as error, Mentzer nevertheless argues that his plea was not voluntarily and intelligently entered because the district court erred in failing to advise him that one of the consequences of his plea was that he might be called upon to make restitution for the damage he caused by striking another vehicle. It is true, we have held that the failure to inform a defendant of the possibility of restitution renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution. *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988). However, we have also held that while in order for a

defendant to enter a voluntary and intelligent plea of guilty, he or she must know the penalty for the crime to which he or she is pleading, and although it is preferable that such knowledge be imparted by the judge accepting the plea, it is nonetheless possible to prove the defendant's knowledge by other means. *State v. Fischer*, 220 Neb. 664, 371 N.W.2d 316 (1985). In this instance, in an effort to persuade the district court to place him on probation, Mentzer, through his attorney, advised that he was "willing to make any restitution that would be ordered proper and necessary in this case to the damage to the vehicle that was parked . . . ." Thus, even if Mentzer had assigned the district court's failure in this regard as error, it would have availed him nothing.

Yet, the driving while intoxicated sentence must be vacated, for, as the State points out as plain error, it is erroneous, first, because it fails to impose the mandatory $500 fine and, second, because the authorized period of imprisonment is 30 days, not 1 month.

Inasmuch as this court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced, *State v. Ferrell*, 218 Neb. 463, 356 N.W.2d 868 (1984), we vacate the sentence imposed for the driving while intoxicated conviction and remand the cause for imposition of the sentence required by law. There being no error or abuse of discretion in the sentence for the possession conviction, that sentence is affirmed.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED FOR RESENTENCING.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN J. FITZGERALD, RESPONDENT.

448 N.W.2d 572

Filed December 1, 1989. No. 87-206.

Original action. Judgment of disbarment.

No appearance for relator.

John H. Kellogg, Jr., for respondent.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), the respondent, John J. Fitzgerald, filed a voluntary surrender of license with this court.

A disciplinary complaint was filed against Fitzgerald with the Counsel for Discipline of the Nebraska State Bar Association. The respondent voluntarily and knowingly admits that he has violated his oath of office as an attorney and that he has violated Canon I, DR 1-102(A)(1), (3), (4), and (6) of the Code of Professional Responsibility. He also voluntarily and knowingly consents to an order of disbarment and waives any right to notice, appearance, or hearing prior to entry of the order.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

JOHN VANEK, PERSONAL REPRESENTATIVE OF THE ESTATE OF TONI MARIE VANEK, DECEASED, APPELLANT, V. PAUL P. PROHASKA, APPELLEE.

JOHN VANEK, APPELLANT, V. PAUL P. PROHASKA, APPELLEE.

448 N.W.2d 573

Filed December 1, 1989. Nos. 87-1048, 87-1056.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, the Supreme Court considers the evidence most favorably to the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. **Negligence.** The defense of assumption of risk presupposes that the injured party had some actual knowledge of the danger, that he understood and appreciated the risk therefrom, and that he voluntarily exposed himself to such risk.
3. **Negligence: Evidence.** A violation of a statute is not negligence per se, but is merely evidence of negligence.
4. **Negligence.** One does not assume the risk of an unknown or hidden danger.
5. **Negligence: Pleadings: Proof: Trial.** When a defendant pleads assumption of risk as an affirmative defense in a negligence action, the defendant has the burden to establish the element of assumption of risk before that defense, as a question of fact, may be submitted to the jury.
6. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, evidence must show that the injured party (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Reversed and remanded for a new trial.

T.J. Hallinan and Gordon D. Ehrlich, of Law Offices of Cobb & Hallinan, P.C., for appellant.

Ray C. Simmons, of Simmons & Schneider, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Plaintiff, John Vanek, appeals from judgments on jury verdicts in favor of the defendant-appellee, Paul P. Prohaska, on both of appellant's causes of action which arose out of the death of Toni Marie Vanek, appellant's daughter, when she was

struck by appellee's vehicle. One action was by appellant as personal representative of the estate of the decedent for the pecuniary loss suffered by the heirs at law; the other action was by appellant for medical and funeral expenses. The cases are consolidated on appeal, as they were at trial.

The appellant's three assignments of error merge to allege that (1) the trial court erred in instructing the jury on the issue of assumption of risk and that (2) the verdicts are contrary to the evidence, to the unvarying and established principles of physics, and to the undisputed physical facts.

In determining the sufficiency of the evidence to sustain a verdict in a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989). Viewing the evidence in favor of the appellee, the record shows the following facts.

On August 16, 1985, Toni Marie Vanek, age 14, took her usual evening run, which consisted of jogging south some 800 or 900 feet along a county road in Saunders County, from her driveway down to the Houfek family driveway, and then back home. The Vanek driveway is on the west side of the road, while the Houfek driveway is on the east side. Toni Marie used this route approximately four times a week.

On the same evening, Paul Prohaska left his home in Prague, Nebraska, at about 8:15 to go to a neighbor's house to watch television. Accompanying Prohaska in his 1980 Ford pickup were his girlfriend, Rita Pospisil, and his brother, Curtis Prohaska. Paul Prohaska drove out of Prague and subsequently onto the road where Toni Marie was jogging. Prohaska was traveling south along the road at about 45 to 50 m.p.h., with his headlights on, when Curtis said he saw something on the side of the road. Prohaska estimated that this statement occurred approximately one-half mile from the accident site and testified that he looked but could not see anything at that point.

Prohaska then testified that he saw something on the right side of the road about one-fourth mile away, but could not tell

what it was. He thought that it might be cattle, as Rudy Houfek always had cattle out on the road. He then began to move over to the left side of the road. When Prohaska reached the Vanek driveway, he "let off" the accelerator, slowing down about 5 m.p.h., and moved all the way over to the left (east) edge of the road.

Prohaska testified that he was two or three car lengths away from the object on the roadside when he realized that it was a person. He stated that the person was moving south on the west side of the road and that as the pickup was going across the Houfek driveway, "she darted out and ran into the side of my pickup." The pickup then went into a ditch on the east side of the road past the Houfek driveway, went up a bank, hit three fenceposts, then went down the bank, and came to a stop in the ditch.

Toni Marie was found lying on the west edge of the road, approximately 30 feet south of the south edge of the Houfek driveway. A rescue unit was called, and a member of the rescue unit radioed the "life flight" helicopter from Omaha. Toni Marie had a large laceration on the back of her upper left thigh, had lacerations on her head and left elbow, and was unresponsive to painful stimuli. She was taken to the University of Nebraska Medical Center, where emergency measures to resuscitate her failed.

ASSUMPTION OF RISK

The first assignment of error on appeal is that the district court erred in instructing the jury on the issue of the decedent's assumption of risk.

The defense of assumption of risk presupposes that the decedent had some actual knowledge of the danger, that she understood and appreciated the risk therefrom, and that she voluntarily exposed herself to such risk. *Hurlbut v. Landgren*, 200 Neb. 413, 264 N.W.2d 174 (1978).

The appellee's evidence of decedent's assumption of risk consisted of testimony by the decedent's mother and father that the decedent, through several conversations with her mother and father on this subject, knew that it was dangerous to walk or jog on the right side of the road. Appellee also claims in his

brief that violation of Neb. Rev. Stat. § 39-646(3) (Reissue 1988) is further evidence of decedent's assumption of risk. Section 39-646(3) provides that "[w]here neither a sidewalk nor a shoulder is available, any pedestrian who walks along and upon a highway shall walk as near as practicable to the edge of the roadway and, if on a two-way roadway, shall walk only on the left side of such roadway."

A violation of a statute is not negligence per se, but is merely evidence of negligence. *Hurlbut, supra.*

We will not extend a violation of § 39-646 to show an assumption of risk. As we stated in *Hurlbut*, "We do not conclude that the mere act of walking along a roadway or on a roadway is of itself an assumption of risk of an accident involving severe personal injuries." *Id.* at 418, 264 N.W.2d at 177.

In the *Hurlbut* case, the plaintiff was approximately 315 feet north of her driveway, walking south along the right side of a shouldered highway at night. She was struck from behind by defendant's vehicle, which was also traveling south. This court upheld the trial court's decision not to submit the defendant's tendered instruction concerning the plaintiff's assumption of risk, regardless of whether she was walking on the shoulder or on the traveled portion of the road.

There was no discussion in *Hurlbut* of whether the plaintiff knew that the defendant's vehicle was approaching. Likewise, there is no evidence in the instant case to suggest whether the decedent had knowledge of the appellee's approaching pickup.

As expressed in Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 487 (5th ed. 1984):

> "Knowledge of the risk is the watchword of assumption of risk." Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Moreover, he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts. . . . Knowledge of the general danger may not be enough, and some courts require knowledge of the specific risk that caused the plaintiff's harm. The standard to be applied is, in theory at least, a subjective

> one, geared to the particular plaintiff and his situation, rather than that of the reasonable person of ordinary prudence who appears in contributory negligence. . . . His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence.

One does not assume the risk of an unknown or hidden danger. *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988). In *Hickman v. Parks Construction Co.*, 162 Neb. 461, 474, 76 N.W.2d 403, 411 (1956), we stated that the doctrine of assumption of risk "applies to *known dangers* and not to those things from which, in possibility, danger may flow." (Emphasis in original.)

Clearly, as *Hurlbut* indicates, walking on the right side of a road is, of itself, merely something from which, in possibility, danger may flow. Further, there is no evidence in the record to suggest that decedent had any knowledge that appellee's pickup was approaching from behind her. At most, appellee's testimony that decedent darted out and into the side of his truck would seem to imply that decedent did not know of the truck's presence. The evidence shows that the decedent knew only that it was generally more dangerous to walk on the right side of the road than on the left side.

When a defendant pleads assumption of risk as an affirmative defense in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury. *Mandery, supra*. Before the defense of assumption of risk was submissible to the jury, evidence must have shown that the decedent (1) *knew* of the danger, (2) understood the danger, and (3) voluntarily exposed herself to the *danger which proximately caused* the plaintiff's damage. *Mandery, supra*. The appellee has failed to meet his burden.

Submitting the defense of assumption of risk was therefore prejudicial to the appellant's substantial right to a fair trial and constituted reversible error, as the evidence was insufficient to sustain an affirmative finding on the assumption of risk issue. See *Mandery, supra*.

Accordingly, the judgments of the district court are reversed,

and the causes are remanded for a new trial. We need not reach appellant's second assignment of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

FRANCIS FLETCHER, PERSONAL REPRESENTATIVE OF THE ESTATE OF BLANCHE FLETCHER PETERSEN, DECEASED, APPELLEE AND CROSS-APPELLANT, V. PAUL MATHEW, APPELLANT AND CROSS-APPELLEE, FIRST NATIONAL BANK AND TRUST CO. OF KEARNEY ET AL., APPELLEES.

448 N.W.2d 576

Filed December 1, 1989. No. 87-1116.

1. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Principal and Agent: Words and Phrases.** A power of attorney is defined as an instrument in writing authorizing another to act as one's agent.
3. _____: _____. A confidential relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.
4. **Fraud: Presumptions: Proof.** Fraud is never presumed and must be proven by clear and convincing evidence.
5. **Fraud.** What constitutes fraud is a question of fact in each case.
6. **Principal and Agent: Fraud: Proof.** A confidential or fiduciary relationship does not shift the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.
7. **Circumstantial Evidence: Fraud: Proof.** Circumstantial evidence alone is not sufficient to sustain a finding of fraud unless the circumstances are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.
8. **Principal and Agent: Proof.** The fiduciary bears the burden of proving the fairness of the transaction.
9. **Principal and Agent.** Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere

faithfully to the instructions of the principal.

10. _____. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal.
11. **Agency: Principal and Agent.** An agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.
12. **Principal and Agent: Gifts: Intent.** As a general rule, gifts procured by agents from their principals should be scrutinized with a close and vigilant suspicion. In order to avoid fraud and abuse, no gift is permitted by an attorney in fact to himself or herself or a third party absent clear intent on the part of the principal to the contrary.
13. **Prejudgment Interest: Claims.** Prejudgment interest may be recovered on claims which are liquidated.
14. **Prejudgment Interest: Claims: Words and Phrases.** A claim is liquidated if the evidence furnishes data which, if believed, make it possible to compute the amount with exactness, without reliance upon opinion or discretion.
15. **Prejudgment Interest: Debtors and Creditors.** When damages are liquidated and no reasonable controversy exists, a creditor is entitled to prejudgment interest as a matter of law.

Appeal from the District Court for Buffalo County: ROBERT R. MORAN, Judge. Affirmed as modified.

Michael M. O'Brien, of Matthews & Cannon, P.C., for appellant.

Terri S. Harder, of Jacobsen, Orr, Nelson & Wright, P.C., for appellee Fletcher.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

The defendant Paul Mathew has appealed a judgment of $590,165.04 in favor of Francis Fletcher, personal representative of the estate of Blanche Fletcher Petersen, deceased. This judgment was entered by the district court on plaintiff's petition alleging fraud and undue influence and praying for an accounting.

The gist of plaintiff's action is that Mathew began manipulating Petersen's financial affairs in the early part of 1981. As a result, it is alleged, by creating certificates of deposit (CD's) in the names of Mathew and Petersen and by various cash transfers accomplished by means of a power of attorney

granted defendant by Petersen, Mathew was able to acquire in his own name approximately $500,000 of Petersen's money.

In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Spire v. Northwestern Bell Tel. Co., ante* p. 262, 445 N.W.2d 284 (1989).

Defendant's assignments of error may be consolidated into two: (1) The plaintiff failed to establish by clear and convincing evidence the elements of fraud, and (2) the court erred in awarding prejudgment interest. In his cross-appeal, plaintiff alleges that the trial court erred by failing to find that defendant's acquisition of Petersen's money was the result of undue influence. We would note at the outset that the trial court's judgment was based on a general finding in favor of the plaintiff. No reference was made in the journal entry as to whether the decision was based on fraud or undue influence. Therefore, because we review this matter de novo on the record, we will affirm if the record supports either theory of recovery.

Mathew was an attorney who had practiced law in Loup City, Nebraska, for over 45 years. He had known the decedent, Petersen, since he was a child.

About 1974, Mathew began to assist Petersen in her daily affairs. At this time, his assistance involved bringing her the mail, social visits, and occasionally driving her to various places.

After suffering a stroke about 10 years before her death, Petersen was hospitalized at the Loup City hospital. From that time until her death on March 21, 1985, she resided at the hospital.

Petersen was 96 years of age at the time of her death. She had no close relatives. Other than Mathew, no one visited her on a regular basis.

According to Mathew's testimony, he began to handle Petersen's financial affairs about 6 months before her stroke. On March 27, 1981, Petersen signed a power of attorney

designating Mathew as her attorney in fact. At that time, Petersen was 92 years of age. During the last several years of Petersen's life, Mathew engaged in numerous activities involving Petersen's money, other property, and personal affairs.

These services included management of Petersen's real estate properties in Nebraska and Kansas (which appear to number six and would produce total annual income of approximately $18,000); personal care such as daily visits, taking her on drives, overseeing her medical attention, and providing flowers and gifts to Petersen and others on special occasions, with her money; and business details such as bookkeeping, correspondence, receipt of income, payment of bills, and, in particular, the depositing of moneys in CD's in the names of both Petersen and Mathew.

Mathew also represented Petersen as her attorney, for which he was paid, in recent years at least, $20,000 by checks drawn on her account written and signed by Mathew.

There was testimony by Mathew and his secretary that Mathew devoted an average of 6 hours per day and his office staff an average of 4 to 5 hours per day in the handling of Petersen's personal and business affairs. However, the supporting evidence to those conclusions was woefully weak.

In the beginning, Mathew would take CD's which were in Petersen's name alone and which were paying only 4 to 7 percent interest and would borrow against them at what he said was 2 percent interest. He would then invest those funds in new CD's paying up to 15 percent which would be placed in both his and Petersen's names. Additional joint CD's were purchased from funds which, according to Mathew, represented the profits, i.e., the money left over each year from Petersen's income after paying her expenses. These CD's, which Mathew transferred to his own account upon Petersen's death, totaled $333,018.17. Additionally, there was a total of $154,676.77 belonging to Petersen which was transferred to Mathew or to Hart of Nebraska, a corporation of which Mathew claimed to be president.

Mathew's explanations of how he came into this money varied. He claimed that it was a gift, that it was for legal fees,

that it was for financial advice, that it was the neighborly thing to do, or that it was just the result of a whim of Petersen's.

According to Mathew's testimony:

> It [the money] piled up fast, boy; it was making money. In those good years, I said, Blanche, what are you going to do with all of this? She said, I might take it with me. I said, that wouldn't be very nice. Why don't we buy some more money markets. If you outlive me, you get it all, and if I outlive you, I get just a small part of it.

At another point in his testimony, Mathew stated with regard to the oral agreement he claimed he made with Petersen:

> The agreement was — I said, Blanche, it's taking a lot of time. I can't afford to spend my time with you, but I will go ahead and see to it that you stay in the hospital, and that we will keep our balances down. But I want my name with your name on all of the profit CDs.

Mathew also told Petersen that either his name was going to be on the CD's or he was not going to represent her anymore. This agreement which Mathew contends he made with Petersen was explained by him in court on about 16 different occasions. Most of the time he said the agreement to place all of those CD's in both of their names was in satisfaction of his services to her. However, he also stated that they were gifts to him. In a separate action seeking fees, his petition alleged that the agreement was that for the management of her assets, he was to receive *one-half* of the profits. When asked about exhibit 2, which indicates that after Petersen's death Mathew received $333,018.17 from CD's in the names of both Petersen and Mathew, he said that was for the work which he did. Specifically, he said, "Well, we agreed that she would pay $460,000 for all of our work." Mathew also admitted that there were no time records kept; he was to be paid for the profits that were made. The record indicates that the agreement was that "whoever lived the longest would get that money." Mathew also testified that at the time the agreement came about, Petersen had told him that she wanted to give him

> the whole works . . . the land, all the buildings, and all the money and everything she owned. . . . She wanted me to move into her house. She would give me the house. But I

> was afraid if she did, she'd walk over to that house from the hospital. It's only a block away. She didn't belong living in a house.

At another point in his testimony, Mathew said, "She wanted — she wanted me to have the whole estate. I said, Blanche, I don't need it, but I would — I do think that I should be entitled to the profits, and she agreed with me on it." Mathew also stated in answer to another question about the agreement: "If I died before she did, I got nothing out of it. But if she died before I did, then I was going to get the $40,000 CDs and there was a lot of them." Finally, when asked if the CD's were to repay Mathew for everything he had done for Petersen, he said, "Well, it wasn't a question of pay. It was a question of being neighborly and honest and fair all the way around."

A power of attorney has been defined as "an instrument in writing authorizing another to act as one's agent." *In re Estate of Lienemann*, 222 Neb. 169, 178, 382 N.W.2d 595, 602 (1986).

> Because the power of attorney creates an agency relationship, the authority and duties of an attorney in fact are governed by the principles of the law of agency [citation omitted], including the prohibitions against an agent's profiting . . . or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal, see *Johnson v. First Nat. Bank*, 253 Ga. 233, 319 S.E.2d 440 (1984).

In re Estate of Lienemann at 178, 382 N.W.2d at 602.

An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and further, resulting from another's consent to so act. *Oddo v. Speedway Scaffold Co., ante* p. 1, 443 N.W.2d 596 (1989).

" '[A confidential] relation exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.' " *Schaneman v. Schaneman*, 206 Neb. 113, 125-26, 291 N.W.2d 412, 420 (1980).

The question for determination is whether Mathew, through the instrument of fraud, deprived the estate of Blanche Fletcher Petersen of property to which it was entitled. The general rule applicable is that fraud is never presumed and must be proven

by clear and convincing evidence. *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986). However, this court has also stated:

> "To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. However, such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred.
>
> "What constitutes fraud is a matter of fact in each case.
>
> . . .
>
> "In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud. . . ."

Workman v. Workman, 174 Neb. 471, 497, 118 N.W.2d 764, 780 (1962).

ServiceMaster Indus., supra, also adds, quoting *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944), "Circumstantial evidence alone is not sufficient to sustain a finding of fraud unless the circumstances ' "are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." ' " 223 Neb. at 44, 388 N.W.2d at 86.

Rettinger also held that the fiduciary bears the burden of proving the fairness of the transaction.

In defending against the fraud charge, Mathew advances the six-point test contained in *English v. Bruin Engineering, Inc.*, 201 Neb. 791, 272 N.W.2d 753 (1978); i.e., that a material representation was made, it was false and known to be false, it was made with the intention that it should be acted upon by another, and it was so acted upon, causing injury or damage to the other. See, also, *Henderson v. Forman*, 231 Neb. 440, 436

N.W.2d 526 (1989). However, that test relates to fraudulent misrepresentations. Fraud in the present instance may be based on agency.

Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986). An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal. *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988).

This court, in *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986), citing *Matter of Estate of Mehus*, 278 N.W.2d 625 (N.D. 1979), and *Johnson v. First Nat. Bank*, 253 Ga. 233, 319 S.E.2d 440 (1984), found that an agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.

Johnson, supra, involved joint CD's purchased by an attorney in fact and the issue of a right of survivorship. The court there held that the acquisition of survivorship rights by the attorney in fact constituted a profit derived by the agent to the detriment of her principal, that detriment being the removal of funds from the principal's testamentary control. The court also held that the attorney in fact failed to sustain the burden of proving that the principal had ratified the agent's action.

The Supreme Court of South Carolina, in *Fender v. Fender*, 285 S.C. 260, 329 S.E.2d 430 (1985), in discussing an agent's claim that the principal orally authorized transfers to the benefit of the agent and to the detriment of his principal, adopted the following rule to discourage fraud and abuse:

> Effectively, absent express intention, an agent may not utilize his position for his or a third party's personal benefit in a substantially gratuitous transfer. . . .
>
> Appellant seeks to remove himself from the operation of the general rule. He contends that Mr. Fender orally authorized the transfers. Notwithstanding such a claim, we hold today that any purported oral authorization was

> ineffective. The power to make any gift must be expressly granted in the instrument itself.
>
> "It is for the common security of mankind . . . 'that gifts procured by agents . . . from their principals, should be scrutinized with a close and vigilant suspicion.' " *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214, 218 (1958). Therefore, in order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary . . . .

Fender at 262, 329 S.E.2d at 431.

We recognize the wisdom of such a rule and hereby adopt it to govern the relationship between attorney in fact and principal. Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted. 3 Am. Jur. 2d *Agency* §§ 31 and 32 (1986).

Applying these precepts to the facts at hand, we note that Mathew, by converting the joint accounts into his own accounts, has profited and Petersen has suffered a detriment in the removal of those funds from her testamentary control.

The power of attorney granted Mathew the following powers:

> Know all men by these presents, that I, the undersigned, Blanche Petersen, of Loup City, in the County of Sherman, State of Nebraska, have made, constituted and appointed, and by these presents, do make, constitute and appoint Paul Mathew, of Loup City, in the County of Sherman, State of Nebraska, my true and lawful attorney in fact, for me and in my name and stead, and to my use, to Endorse Checks and Deposit Proceeds, to Change my C.D. Funds to Cash or to Money Fund Certificates, to Collect Debts and Recover Debts in Another State, to Receive a Legacy, to Make Partition of and Recover an Estate, to Sale [sic] and Conveyance [sic] of Real Estate, also the Power to Sell and Convey Real Estate, the Power to Sell Lands in Another State, the Granting Power to Mortgage, to Lease Premises and to Manage my Investments, hereby giving unto my said attorney in fact, full authority and power to do everything whatsoever requisite or necessary to be done in the premises, as fully

> as I could or might do if personally present, with full power of substitution and revocation, hereby confirming and ratifying all that my said attorney in fact shall lawfully do or cause to be done, hereunder.

There is no language in the foregoing instrument that empowered Mathew to convert funds to his own use or to make gifts to himself from Petersen's funds. He had used his position to influence Petersen to allow such gifts to be made if in fact she did allow it. He admitted that if he did not visit Petersen she would not eat. He told her that his name would have to be on the CD's or he would not represent her anymore.

In terms of fairness and credibility, the age difference between Mathew and Petersen in light of the survivorship arrangement, Petersen's health, her apparent dependency on Mathew, and the comparison of her 11th grade education with his training and status as a lawyer, as well as Mathew's claim that the records were simply lost, his rather weak explanations of other facets of his relationship with Petersen, and his equivocal and changing explanations of the financial arrangements, are all factors which must be considered by the court.

Plaintiff has made out a prima facie case of fraud. In light of the fiduciary relationship, the burden of going forward with the evidence fell upon the shoulders of Mathew. The trial court did not believe that he had met that burden and neither do we.

Regarding the issue of prejudgment interest, the rule is adequately set forth in *Hill v. City of Lincoln*, 221 Neb. 719, 723, 380 N.W.2d 296, 299 (1986), where this court said: "Prejudgment interest may be recovered on claims which are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion."

Mathew stipulated prior to trial that he had acquired $333,018.17 from the jointly titled CD's belonging to Petersen and him. An additional $154,676.77 included within the court's judgment was for items identified precisely and without question by the computations of the accountant, which in turn were based on records of CD's and canceled checks.

Since the damages were liquidated and no reasonable

controversy existed, the plaintiff was entitled to prejudgment interest as a matter of law. *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981). This amounted to $104,995.68 from the date of Petersen's death to the date of the judgment at the rate of 7.64 percent, as provided by Neb. Rev. Stat. § 45-103 (Reissue 1988). This action predated the rule in *Knox v. Cook, ante* p. 387, 446 N.W.2d 1 (1989).

The judgment, therefore, should be modified to provide a total recovery of $592,690.62, and as modified it is affirmed.

AFFIRMED AS MODIFIED.

NUCOR STEEL, A DIVISION OF NUCOR CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

448 N.W.2d 909

Filed December 1, 1989. No. 88-225.

1. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
2. **Taxation.** Neb. Rev. Stat. § 77-2702(11)(a) and (20) (Reissue 1986) provides an exemption from the Nebraska sales and use tax.
3. **Statutes: Taxation: Proof.** Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption.
4. **Taxation.** Material which only accidentally or incidentally becomes incorporated into a finished product and which is not an essential ingredient of the finished product is subject to sales and use tax because such material is not an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail.
5. _____. So long as a material entered into and is an essential ingredient or component part of a product manufactured, processed, or fabricated for ultimate sale at retail, the material is excluded from the Nebraska sales and use tax, notwithstanding that the material may be used for more than one purpose in manufacturing, processing, or fabricating the product.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

R. Murray Ogborn and Tim O'Neill, of Nelson & Harding, for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Nucor Steel filed two claims with the Tax Commissioner of the State of Nebraska for refunds of sales and use taxes paid for August through December 1983 and for the period from January 1984 to August 1986 regarding Nucor's purchase and use of refractory materials in connection with Nucor's manufacture of steel. The commissioner denied both claims, and on March 13 and Agusut 26, 1987, Nucor appealed to the district court for Lancaster County, which consolidated the appeals and affirmed the Tax Commissioner's decisions. In its appeal to this court, Nucor seeks reversal of the district court's judgment.

STANDARD OF REVIEW

An appeal from a decision by the Tax Commissioner of the State of Nebraska is governed by the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987). *American Stores Packing Co. v. Peters*, 203 Neb. 76, 277 N.W.2d 544 (1979).

> In an appeal pursuant to the Administrative Procedure Act, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the conclusion reached by the administrative agency, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the administrative agency heard and observed the witnesses and accepted one version of the facts rather than another.

Department of Health v. Omaha Associates, 232 Neb. 516, 517, 441 N.W.2d 579, 580-81 (1989). See, also, *Heithoff v. Nebraska State Bd. of Ed.*, 230 Neb. 209, 430 N.W.2d 681 (1988); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). See,

further, § 84-918 (Supreme Court's de novo review under Administrative Procedure Act).

APPLICABLE TAX STATUTES

"Retail sale or sale at retail shall mean: (a) A sale for any purpose other than for resale in the regular course of business of tangible personal property . . . ." Neb. Rev. Stat. § 77-2702(10) (Reissue 1986).

"Retail sale or sale at retail shall not include the sale of: (a) Tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail . . . ." § 77-2702(11).

A sale for resale

> shall mean a sale of tangible personal property to any purchaser who is purchasing such tangible personal property for the purpose of reselling it in the normal course of his or her business, either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property.

§ 77-2702(14).

> Use . . . does not include the sale of that tangible personal property in the regular course of business or the exercise of any right or power over tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail.

§ 77-2702(20).

A sales tax is imposed "upon the gross receipts from all sales of tangible personal property sold at retail in this state . . . ." Neb. Rev. Stat. § 77-2703(1) (Reissue 1986). A use tax is imposed "on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer . . . for storage, use, or other consumption in this state . . . ." § 77-2703(2).

BURDEN OF PROOF

The tax statutes involved in Nucor's appeal contain definitions which exclude or except personal property from the Nebraska sales and use tax. See § 77-2702(11)(a) and (20).

Nucor contends that the statutory definitions which relate to exclusion or exception from the sales and use tax should be liberally construed.

However, in addition to the specific tax statutes which we have mentioned as applicable to Nucor's appeal, we note provisions of the Nebraska "Sales and Use Tax Regulations," promulgated by the Nebraska Tax Commissioner, namely, 316 Neb. Admin. Code § 1-012 (1984), which provides:

> 012.02 There are *exempted* from the computation of the amount of sales and use taxes the gross receipts from the sale, lease, or rental of and the storage, use, or other consumption in this state of the following:
>
> . . . .
>
> 012.02D Transactions given *exempt* status due to the purchaser's intended use of the property purchased, leased, or rented. Included in this group are sales of:
>
> . . . .
>
> 012.02D(2) Property which will be incorporated as an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail . . . .

(Emphasis supplied.)

Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. See, *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 284 N.W.2d 10 (1979); *Kansas Gas & Elec. v. Com'n on Civ. Rights*, 242 Kan. 763, 750 P.2d 1055 (1988); *State v. Jenkins*, 469 So. 2d 733 (Fla. 1985); *Eastman Kodak Co. v. Fair Emp. Prac. Com.*, 86 Ill. 2d 60, 526 N.E.2d 877 (1981). See, also, § 84-902.

As a result of our examination of the language in § 77-2702(11)(a) and (20), coupled with our reading of the sales and use tax regulations, we conclude that § 77-2702(11)(a) and (20) provides an exemption from the Nebraska sales and use tax. Our construction that § 77-2702(11)(a) and (20) affords an exemption from a sales and use tax is consistent with the decisions of several other courts which have construed exclusionary language substantially similar to that found in § 77-2702(11)(a) and (20); for example, see, *North Star Steel v.*

Iowa Dept. of Revenue, 380 N.W.2d 677, 680 (Iowa 1986) (" ' "use" . . . shall not include processing, or the sale of . . . property in the regular course of business,' " expressed in the Iowa use tax statute, "creat[ed] an exemption from tax"); *Hospital Utilization Project v. Com.*, 507 Pa. 1, 487 A.2d 1306 (1985) (sales and use tax statute which excluded manufacturers involved in certain types of research provided an exemption from sales and use tax); *Chicago, B. & Q. R. Co. v. State Tax Comm.*, 259 Iowa 178, 142 N.W.2d 407 (1966); *Borroughs Corp. v. State Bd. of Equalization*, 153 Cal. App. 3d 1152, 200 Cal. Rptr. 816 (1984) (statutory language, use "does not include the sale of . . . property in the regular course of business," constitutes a resale exemption); *Federated v. Kosydar*, 45 Ohio St. 2d 1, 340 N.E.2d 840 (1976) (statutory exceptions from sales and use taxation pertain to a right to an exception (exemption)); *Matter of Shanty Hollow Corp. v New York State Tax Commn.*, 111 A.D.2d 968, 490 N.Y.S.2d 67 (1985) (sales tax law excepting charges to a patron for admission to use of facilities for sporting activities provided an exemption from taxation); *Timken Co. v. Lindley*, 29 Ohio App. 3d 181, 504 N.E.2d 455 (1985) (sales and use tax statute which contains certain exceptions allowed exemptions from such tax).

Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption. *Vulcraft v. Karnes*, 229 Neb. 676, 428 N.W.2d 505 (1988); *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986).

Thus, to prevail on its refund claim, Nucor must establish that it is entitled to exemption from the Nebraska sales and use tax.

BACKGROUND

Nucor Steel is engaged in manufacturing steel at its plant in Norfolk, Nebraska. Nucor's steelmaking process begins with its smelter operations of melting scrap metal in an electric arc furnace and subsequent refining of the molten mass through addition of lime to remove impurities in the metal. After refinement under an appropriately high temperature, the

molten steel is poured from the furnace into a ladle for additional lime. The ladle transports the molten steel to the tundish, from which the molten metal is poured into molds which form steel billets.

Throughout smelting, Nucor must keep the steel in a molten state until the metal is poured into the billet molds. The furnace, ladle, tundish, and other manufacturing equipment used to melt metal and transfer molten steel are also made of steel. To protect the furnace and other manufacturing equipment from damage by exposure to the extremely high temperatures necessary for manufacturing steel, Nucor utilizes refractories, an insulating and protective barrier for the equipment exposed to the molten steel and its high temperature.

Due to their high melting point and ability to resist heat, refractories do not melt from the heat generated to make molten steel. In view of the high cost of refractories, Nucor tries to buy long-life refractories and takes great efforts to prolong the life of refractory material, including special care in loading scrap metal into the furnace to avoid damaging the refractories. Also, to protect refractories while molten metals are being refined, Nucor adds lime, but the lime is not intended to affect the quality of various forms of waste or byproducts—slag, scale, or bag dust—which occur in the steelmaking process. Notwithstanding efforts to conserve refractories utilized in Nucor's steelmaking process, refractories wear away and deteriorate, so that Nucor has to purchase new refractory material to replace that which has dislodged during smelting or which has become exhausted as an effective insulator. Nucor does not select refractory material on the basis of a refractory's contribution to slag, scale, or bag dust. Although some refractories are composed primarily of and all have minimal traces of other compounds, most refractories are primarily composed of silica and alumina.

Refining molten scrap metal in the steelmaking process causes the formation of slag, a substance composed of lime and other impurities extracted during refining. Slag floats atop molten metal, is eventually removed, and, after cooling, is then placed in a slag pile. Refractories become involved with slag when the refractories wear away from the walls of the

steel-manufacturing equipment and fall into the slag floating on the molten metal or when the refractories deteriorate to the point of inadequacy as an insulator and are, therefore, removed and placed in the slag pile. Approximately 95 percent of the utilized refractories enter into the composition of slag. Slag, then, as it exists after the steelmaking and refining process, is composed of lime, impurities from scrap metal, and refractory material. After iron is removed from the slag pile, Nucor sometimes sells slag, which is used as a substitute for gravel. Apart from whatever may be a technical explanation for and description of slag, "slag" means

> the dross of a metal; *specif*: a product of smelting containing mostly as silicates the substances not sought to be produced as matte or metal and having a lower specific gravity than the latter . . . a similar substance that floats on molten impure steel during refining, protects the metal from oxidation, and removes unwanted substances chemically . . . worthless matter.

Webster's Third New International Dictionary, Unabridged 2137 (1981). Further, "dross" means

> the solid scum that forms on the surface of a metal . . . when molten or melting largely as a result of oxidation but sometimes of the rising of dirt and impurities to the surface . . . waste or foreign matter mixed with a substance or left as a residue after that substance has been used or processed . . . .

Id. at 694.

Scale is an oxide that forms on steel billets when molten steel hardens. Ninety-five percent of scale consists of iron, silicon, and aluminum which has oxidized on the billets and contains a small amount of refractory material that has fallen into the molten metal held by the billet molds. Nucor sells scale to a manufacturer which processes the scale and sells the processed scale to cement companies. The scale's iron oxide, rather than refractories, provides value to the processed scale.

Bag dust consists of particles, including some minute pieces of refractory material, removed by an exhaust system during the refining process. Nucor has sold, or at times given away, the bag dust to a firm that processes the dust into a micronutrient

used in fertilizer. Since bag dust has been classified as a hazardous material by the Environmental Protection Agency, Nucor gives away any bag dust which cannot be sold inasmuch as Nucor lacks proper storage facilities for this material. The value of bag dust is attributed to zinc and iron, neither of which originates in the refractory material used by Nucor.

In its refund claims, Nucor essentially contends that since virtually all the refractories are eventually present in slag, scale, or bag dust, purchase and use of refractories are excluded from Nebraska's sales and use tax because the refractory material enters into or becomes an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail. See § 77-2702(11)(a) and (20). Nucor also contends that its purchase and use of refractories are not subject to sales and use tax because refractories are purchased for resale in the regular course of Nucor's steelmaking business. See § 77-2702(10)(a), (14), and (20).

INGREDIENT AND COMPONENT PART EXEMPTION

Nucor first claims that the refractory material is personal property that enters into and becomes "an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail," see § 77-2702(20), and, thus, is not subject to the sales and use tax imposed under § 77-2703(1) and (2).

Regarding Nucor's claims, refractory materials are not subject to sales and use tax if two statutory requirements are fulfilled: (1) the refractories enter into and become an ingredient or component part of a finished product (slag, scale, bag dust), and (2) the finished product (slag, scale, bag dust) is manufactured, processed, or fabricated for ultimate sale at retail. See § 77-2702(11)(a) and (20).

Concerning the Nebraska sales and use tax, the exemptive requirement that the property enter and become an ingredient or component part of a finished product has been discussed in two decisions of this court.

In *American Stores Packing Co. v. Peters*, 203 Neb. 76, 277 N.W.2d 544 (1979), this court determined that cellulose casings

used in the manufacture of skinless meat products (frankfurters) did not become an ingredient or component part of the frankfurters. Casings served as a mold for frankfurters, and only a small amount of glycerin, which was contained in the casings, found its way into the frankfurters. In concluding that the casings did not become an ingredient or component part of the frankfurters, we stated:

> The determination of whether or not tangible property enters into or becomes an ingredient or component part of other property does not ordinarily offer any difficulty. The lumber which goes into the manufacture of a piece of furniture obviously becomes a component part of that furniture, i.e., the function of the lumber is that of being a component and it serves no other purpose. In the case before us, the casing served the apparently indispensable function of a mold. In the end, the casing is discarded. . . . The principal function of the glycerine and moisture is to enable the casing to serve its function. The transfer of some part of the glycerine into meat which already contains glycerine appears *incidental.*

(Emphasis supplied.) *Id.* at 83, 277 N.W.2d at 548.

In *Nucor Steel v. Herrington*, 212 Neb. 310, 322 N.W.2d 647 (1982), this court again interpreted the "ingredient and component part" exclusion from sales and use tax and held:

> Where graphite electrodes are used in the manufacture of steel for the dual purpose of providing essential carbon for the steel manufacturing process and for the conduction of electricity which provides heat for the process, and where a substantial part of the graphite electrodes enters into and becomes an *essential* ingredient or component part of the finished steel and the remainder is consumed in the manufacturing and refining process, the use of such graphite electrodes in the manufacturing and processing of steel for ultimate sale at retail is not subject to taxation under the provisions of §§ 77-2702 and 77-2703.

(Emphasis supplied.) *Id.* at 318-19, 322 N.W.2d at 651. Also, in *Nucor Steel v. Herrington, supra*, the court "distinguished steel processing cases in which the property involved was an *essential*

component that entered into the chemical process of making steel" (emphasis supplied), *id.* at 316, 322 N.W.2d at 650, from those cases in which "the taxed substance was only *incidentally* added to the final product rather than being an *essential* ingredient or component part of the finished product." (Emphasis supplied.) *Id.* at 317, 322 N.W.2d at 650.

"Incidental" means "occurring merely by chance or without intention or calculation: occurring as a minor concomitant . . . being likely to ensue as a chance or minor consequence . . . met or encountered casually or by accident." Webster's Third New International Dictionary, Unabridged 1142 (1981). "Incidentally" means "by chance: as a matter of minor import: CASUALLY." *Id.*

From *American Stores Packing Co. v. Peters, supra*, and *Nucor Steel v. Herrington, supra*, the principle evolves that material which only accidentally or incidentally becomes incorporated into a finished product and which is not an essential ingredient of the finished product is subject to sales and use tax because such material is not an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail.

So long as a material enters into and is an essential ingredient or component part of a product manufactured, processed, or fabricated for ultimate sale at retail, the material is excluded from the Nebraska sales and use tax, notwithstanding that the material may be used for more than one purpose in manufacturing, processing, or fabricating the product. *Nucor Steel v. Herrington, supra.*

The refractories involved in Nucor's present appeal are clearly used for the purpose of protecting the steel-manufacturing equipment from high temperatures. The refractory material may, nevertheless, qualify for exclusion from sales and use tax if refractories enter into and become an essential ingredient or component part of the slag, scale, or bag dust as products manufactured, processed, or fabricated for ultimate sale at retail.

For scale and bag dust, refractories do not contribute any value. Although small quantities of refractories are present in scale and bag dust involved in the steelmaking process, the

value of scale and bag dust is not attributable to any substance found in the refractories. From a practical as well as an analytical point of view, bag dust and scale would be the same with or without refractories. Consequently, refractories are merely incidental to scale and bag dust.

It is unclear whether refractories become an essential ingredient or component part of slag. On one hand, Nucor's concern about prolonging the life of refractories, coupled with the manner in which refractories exist in slag, leads to the conclusion that the presence of refractories in slag is only incidental to the slag. On the other hand, approximately 95 percent of the refractories are eventually involved in slag. Hence, the evidence is inconclusive whether the slag's value is attributable to the introduction of refractories or exists independent of refractories.

However, notwithstanding a determination that refractories enter into and become an essential ingredient or component part of the slag, the slag itself must be a product "manufactured, processed, or fabricated for ultimate sale at retail" before refractory material is exempt from the Nebraska sales and use tax.

In *American Stores Packing Co. v. Peters*, 203 Neb. 76, 277 N.W.2d 544 (1979), without avail the taxpayer claimed that a cellulose casing was incorporated into a finished meat product, i.e., a frankfurter. Obviously, a frankfurter is a product "manufactured, processed, or fabricated for ultimate sale at retail." In *Nucor Steel v. Herrington*, 212 Neb. 310, 322 N.W.2d 647 (1982), the taxpayer successfully argued that carbon electrodes were incorporated into the finished product of steel, which is a product "manufactured, processed, or fabricated for ultimate sale at retail."

Yet, it is far from obvious that the slag is a product "manufactured, processed, or fabricated for ultimate sale at retail." "Manufacture," in its ordinary usage, means "to make (as raw material) into a product suitable for use . . . to make from raw materials by hand or by machinery . . . to produce according to an organized plan and with division of labor . . . ." Webster's Third New International Dictionary, Unabridged 1378 (1981). "Process" means "to subject to a particular

method, system, or technique of preparation, handling, or other treatment designed to effect a particular result . . . ." *Id.* at 1808. "Fabricate" means "to form by art and labor: MANUFACTURE, PRODUCE . . . to form into a whole by uniting parts: CONSTRUCT, BUILD . . . to build up into a whole by uniting interchangeable standardized parts . . . ." *Id.* at 811.

Nucor's slag consists of lime, impurities from the scrap metal, and a small amount of refractory material. Slag contains refractory material which has served as an insulator protecting Nucor's equipment against extremely high temperatures, but has accidentally, or at least without design in the steelmaking process, fallen from the insulated equipment into the floating slag atop the molten metal, or which, more simply, has been discarded because the refractories have lost their capacity to adequately insulate Nucor's equipment during the steelmaking process. In the light of the foregoing definitions of "manufacture" and "process," refractories which have fallen from the walls of a furnace or which have been discarded on a slag pile cannot be reasonably characterized as material used in a product, slag, which has been "manufactured, processed, or fabricated for ultimate sale at retail."

Furthermore, as the definition of "process" indicates, the system or method used must be "designed to effect a particular result . . . ." The definition of "manufacture" commences with "to make" or "to produce," and the definition of "fabricate" begins with "to form." In reference to processing, manufacturing, or fabrication, "to" means "for the purpose of" or "with the result of." *Id.* at 2401. Clearly, Nucor's business activity is manufacturing steel. The presence of refractory material in slag, scale, and bag dust is only incidental to Nucor's business activity, as evidenced by the fact that Nucor selects refractories solely on the basis of performance and longevity as effective insulators for steel-manufacturing equipment and not on the basis of refractory material as an element of slag, scale, or bag dust.

In support of its argument that refractories are an ingredient or component part of a product manufactured, processed, or fabricated for ultimate retail sale, Nucor relies heavily on *North*

Star Steel v. Iowa Dept. of Revenue, 380 N.W.2d 677 (Iowa 1986), in which the Iowa Supreme Court determined that refractory material used in the steelmaking process was not subject to the Iowa use tax in view of a processing exemption in Iowa Code § 423.1(1) (1977), which provided:

> " '*Use*' means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in 'processing' within the meaning of this subsection shall mean and include (a) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail . . . "

380 N.W.2d at 680. As used by the court in *North Star Steel*, "processing 'refers to an operation whereby raw material is subjected to some special treatment by artificial or natural means which changes its form, context, or condition, and results in marketable tangible personal property.' " 380 N.W.2d at 683. With the foregoing definition of "processing," the court in *North Star Steel* determined that refractory material was property used in "processing" within the meaning of the Iowa use tax statute and, therefore, was exempt from taxation in Iowa because "[t]here is no evidentiary support whatsoever for the further determination by the agency that North Star did not 'intend' the refractory material to enter the slag and bag dust, retail products." *Id.*

However, in *North Star Steel*, there was no mention of two important facts present in Nucor's current appeal to this court, namely, Nucor (1) selects refractories solely for their durability and performance as insulation for steel-manufacturing equipment and (2) takes precautionary measures to maximize the duration of refractories and minimize their dissipation. Thus, *North Star Steel* is readily distinguished from Nucor's case because there is ample evidence to support the finding that Nucor had no plan or design for introduction of the refractory

material, directly or indirectly, into slag, scale, and bag dust in connection with the production of steel. Furthermore, while the court in *North Star Steel* determined that refractory material was used in the "processing" of slag and bag dust, it is extremely difficult, if not impossible, to characterize carting debilitated refractories from the smelter to the slag pile as "special treatment" involved in steelmaking. Although slag and bag dust were sold at retail, such sale does not necessarily mean that the items are "processed" for ultimate sale at retail. Consequently, *North Star Steel* is unpersuasive for a determination of Nucor's present appeal.

Nucor also relies on *Lone Star Indus. v. Dep't of Revenue*, 97 Wash. 2d 630, 647 P.2d 1013 (1982). In *Lone Star*, the Supreme Court of Washington found that purchase and use of refractory material for a kiln used in the manufacture of cement were exempt from Washington's use tax. Nucor points out that the court in *Lone Star* based its holding on the fact that the refractory material became an ingredient of cement, but ignores the fact that the court made a specific finding that the refractory material contained *necessary* and *essential* ingredients for cement. Thus, the *Lone Star* decision comports with the principle that refractories, to be exempt from a sales and use tax, must enter into and become essential ingredients or component parts of slag, scale, or bag dust, which occur in the process of steelmaking.

Nucor has failed to establish that refractories entered into and became essential ingredients or component parts of Nucor's slag, scale, or bag dust. Nucor has also failed to show that slag, scale, or bag dust are property manufactured, processed, or fabricated for ultimate sale at retail. For these reasons, Nucor has failed to establish that it is entitled to an exemption from Nebraska's sales and use tax. See § 77-2702(11)(a) and (20).

RESALE IN REGULAR COURSE OF BUSINESS

Nucor's second argument is that the refractory materials are purchased for resale in the regular course of Nucor's business and, thus, are excluded from taxation under the definitions of "sale at retail," "sale for resale," and "use." See

§ 77-2702(10)(a), (14), and (20). Nucor argues that since refractory material is resold as slag, scale, or bag dust in the regular course of its business, the refractory material is not subject to the sales and use tax.

As we have previously stated in this opinion, Nucor selects refractories on the basis of their performance as insulators for Nucor's equipment used in making steel. Efficacy in reference to slag, scale, or bag dust is not a consideration in Nucor's selection of refractory material. Since Nucor clearly does not purchase refractories for the purpose of reselling the refractories, Nucor does not satisfy the requirement of § 77-2702(14), namely, exemption from the Nebraska sales and use tax concerning property purchased "for the purpose of reselling it . . . ." In view of our discussion regarding the relationship between refractory material and slag, scale, and bag dust, that is, whether refractories become ingredients or component parts of slag, scale, and bag dust as byproducts in Nucor's business of steelmaking, Nucor has failed to demonstrate that refractories are resold "as an . . . integral part of other . . . property" to qualify for exemption from the sales and use tax pursuant to § 77-2702(14).

CONCLUSION

After our de novo review of the record, we arrive at the same conclusion reached by the district court, namely, Nucor is not entitled to the tax refunds claimed. Consequently, the district court's judgment affirming the Tax Commissioner's orders rejecting and denying Nucor's refund claims is affirmed.

AFFIRMED.

LEE WICKLINE, APPELLANT, V. FRANK GUNTER, APPELLEE.
448 N.W.2d 584

Filed December 1, 1989. No. 88-965.

Habeas Corpus: Extradition and Detainer: Prisoners. Habeas corpus is not the proper action to challenge the validity of a detainer, where the state filing the detainer has not requested transfer of the prisoner.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Lee Wickline, pro se.

Robert M. Spire, Attorney General, and William L. Howland for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Petitioner-appellant, Lee Wickline, who is presently serving a prison sentence in Nebraska, filed a "Petition for Writ of Habeas Corpus ad Subjiciendum" in Lancaster County. Frank Gunter, described in the petition as the "Director of the Nebraska Department of Correctional Services," is the respondent-appellee. The district court found on the pleadings that Wickline was lawfully imprisoned, held that Wickline failed to allege sufficient facts to entitle him to the writ of habeas corpus, and dismissed the action. Wickline timely appealed to this court.

In this court, Wickline's assignments of error allege that the trial court erred in finding that Wickline's petition failed to allege facts sufficient to entitle him to a writ of habeas corpus. We affirm.

The record and our earlier decisions concerning appellant show the following. On June 7, 1988, Wickline was convicted of theft and burglary in Holt County, Nebraska, and was sentenced to a term of 6 to 10 years' imprisonment on each charge, with the sentences to be served concurrently. On May 26, 1989, appellant's convictions were affirmed. See *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989).

On August 1, 1988, the sheriff's department of Cass County,

North Dakota, filed a complaint and warrant for the arrest of appellant with the Nebraska Department of Correctional Services. The complaint had been originally filed in Cass County, North Dakota, and alleged that on or about March 24, 1988, Wickline committed a burglary in Cass County, North Dakota. The Nebraska Department of Correctional Services filed the complaint and warrant as a detainer and informed the sheriff of Cass County, North Dakota, that he would "be advised approximately 30 days prior to Wickline's release date which is now tentatively scheduled for September 4, 1998."

On October 26, 1988, Wickline filed a petition for a writ of habeas corpus alleging, in substance, that he did not commit a crime in or against North Dakota, that he was not in North Dakota at the time of the alleged crime, and that the North Dakota complaint was an arbitrary act by North Dakota which causes Wickline, in his Nebraska incarceration, to be deprived of opportunities for early release, involvement in rehabilitation programs, and eligibility for lesser security classifications. Wickline also alleged that the detainer causes him to be detained in "excess" of his current sentence. Wickline's petition prayed for an order granting the writ and quashing the North Dakota detainer.

In response to the trial court's order to show cause, appellee alleged that Wickline's sentence had not been set aside or vacated, that his detention was lawful pursuant to the order of the district court of Holt County, Nebraska, and that Wickline's sentence was within lawful limits. Appellee's response acknowledged the filing of the North Dakota complaint and warrant constituting a detainer and the filing of two other detainers, and alleged compliance with the notice requirements of the interstate Agreement on Detainers, Neb. Rev. Stat. § 29-759 (Reissue 1985). Appellee's response prayed that Wickline's petition be dismissed because Wickline's imprisonment was lawful and because the other issues raised in the complaint were not the proper subject matter in a habeas proceeding.

Both Nebraska and North Dakota are contracting parties to the Agreement on Detainers. That agreement provides a means for a state filing a detainer or for a prisoner subject to a detainer

to initiate proceedings leading to the expeditious trial of a complaint underlying a detainer. Article IV of the Agreement on Detainers provides a procedure for a state filing a detainer based on an untried complaint to obtain temporary custody of a prisoner to dispose of the complaint. Article III of the Agreement on Detainers provides a procedure for the prisoner to bring about an expeditious trial on an untried complaint.

Wickline has not exercised his right under the Agreement on Detainers, article III, to initiate proceedings to require North Dakota to dispose of its complaint by forcing North Dakota to either bring him to trial on the complaint within 180 days of initiation or to subject the complaint to future dismissal with prejudice. *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984); *Cuyler v. Adams*, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981). Under article III, Wickline would be required to waive extradition rights and would consent to attend any court proceedings necessary to effectuate the agreement.

The State of North Dakota has not requested the transfer of Wickline for trial in North Dakota through either the Agreement on Detainers or the Uniform Criminal Extradition Act, Neb. Rev. Stat. §§ 29-729 to 29-758 (Reissue 1985).

Consequently, the issue presented is whether habeas corpus is an appropriate action to attack the validity of a foreign detainer absent a request by the state filing the detainer for transfer. Recently, in *Rust v. Gunter*, 228 Neb. 141, 143, 421 N.W.2d 458, 460 (1988), we reiterated the language of *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977), which stated:

> "This court has numerous times held that in the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. [Citations omitted.] Persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ. § 29-2801, R.R.S. 1943 [citation omitted]. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence. [Citation omitted.]"

Wickline's petition does not challenge the validity of his

conviction, sentence, or imprisonment in Nebraska, and it was evident from his petition that he was not being held in "excess" of his sentence. Wickline did not allege that he was entitled to be discharged. Thus, Wickline is essentially challenging the alleged increased severity of the condition of his confinement caused by the detainer. The rule is clear that a challenge stating facts not ultimately entitling the petitioner to discharge is not cognizable in a habeas corpus proceeding. See *Gamron v. Parratt*, 199 Neb. 163, 256 N.W.2d 867 (1977). As we stated in *Rust*, where the habeas petitioner sought to challenge his placement in solitary confinement, "Whatever [the petitioner] may view as incorrect about the conditions of his confinement, his complaints under the circumstances are inappropriate subject matter for a petition and proceedings for a writ of habeas corpus." 228 Neb. at 144, 421 N.W.2d at 460.

Other state courts have come to a similar conclusion that their respective habeas actions are not available to challenge foreign detainers. See, *State v. Warren*, 740 S.W.2d 427 (Tenn. Crim. App. 1986); *Russell v. Cooper*, 724 P.2d 1302 (Colo. 1986). But see *Aaron v. State*, 497 So. 2d 603 (Ala. App. 1986).

The State of Nebraska has acknowledged and addressed Wickline's position by enacting the Agreement on Detainers. Wickline's desire for a habeas corpus hearing similar to the extradition habeas hearing need not be granted absent North Dakota's request for his transfer. Wickline appears to argue he has a due process right to challenge a detainer before the Nebraska Department of Correctional Services may treat the detainer as valid. We hold that habeas corpus is not the proper action to challenge the validity of a detainer based upon an untried complaint, where the state filing the detainer has not requested transfer of the prisoner.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL F. HARMS, APPELLANT.

449 N.W.2d 1

Filed December 1, 1989. No. 88-978.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong.
2. **Constitutional Law: Search and Seizure: Motor Vehicles.** An occupant of a vehicle will ordinarily have a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop as violative of his fourth amendment rights.
3. **Constitutional Law: Search and Seizure.** The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.
4. _____: _____. Ownership and possessory rights in "places" are still important in determining whether a particular person has a legitimate expectation of privacy in a particular place.
5. **Search and Seizure: Police Officers and Sheriffs: Evidence.** Evidence illegally obtained by federal law enforcement personnel cannot be used in Nebraska state courts, provided the lawfulness of the seizure is properly raised and adjudicated.
6. **Constitutional Law: Search and Seizure: Motions to Suppress: Proof: Search Warrants.** In a motion to suppress, the State has the burden to prove that the search and seizure was constitutionally permissible when the police, in conducting the search, acted without a search warrant.
7. **Pretrial Procedure: Motions to Suppress.** It is clearly the intention of Neb. Rev. Stat. § 29-822 (Reissue 1985) that motions to suppress evidence are to be ruled on and finally determined before trial, unless the motion is within the exceptions contained in the statute.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Reversed and remanded for a new trial.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

After a bench trial to the Pawnee County District Court, Michael F. Harms was found guilty of unlawful manufacture or

distribution of a controlled substance and possession of marijuana weighing more than 1 pound. He appeals to this court. For the reasons set forth below, we reverse and remand for a new trial.

On October 23, 1987, Harms was driving a pickup in Pawnee County, Nebraska. This pickup was owned by Dennis Jurgens, who was a passenger in the pickup. The pickup approached and stopped at a check stop "selective" conducted by the Nebraska State Patrol at the junction of Highways 4 and 99. After State Patrol officers observed marijuana in the pickup, both Jurgens and Harms were arrested. Subsequent searches of the vehicle and of real property owned by Jurgens uncovered large quantities of marijuana. Informations were later filed against both defendants. For a complete discussion of the check stop selective and the searches, see *State v. One 1987 Toyota Pickup, ante* p. 670, 447 N.W.2d 243 (1989).

On April 12, 1988, Harms filed a motion to suppress any evidence discovered as a result of the stop of the pickup. On April 20, a hearing on this motion was held. Considerable evidence was elicited concerning the State Patrol's method of establishing and conducting the check stop selective. The motion to suppress was overruled.

On September 8, Harms filed a motion to suppress as evidence a notebook recovered from a portable shed on the Jurgens property. The evidence at trial showed that on April 21, 1988, Gordon McDevitt, a deputy U.S. marshall, went to the Jurgens farm to serve a "warrant for arrest in rem." While on the Jurgens property McDevitt, by using the services of a locksmith, gained access to a locked portable toolshed. Once inside the shed, McDevitt discovered a spiral-bound notebook hidden in a portable cooler. He gave the notebook to Pawnee County Sheriff John Schulze. This motion to suppress was also overruled.

After a trial to the court on September 19, Harms was found guilty on both counts. We note that Harms made timely objections to the admission of the evidence at trial.

Harms appeals from these convictions. His sole assignment of error is that the trial court erred in overruling his motions to suppress.

This court has stated that in determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. One 1987 Toyota Pickup, supra*; *State v. Marcotte, ante* p. 533, 446 N.W.2d 228 (1989). Our review of the record in this case does not disclose whether the trial court made factual findings. In any event, it is not necessary for this court to examine those findings, if any, because it is evident that the trial court erroneously applied the law in overruling the motions to suppress.

With regard to the April 12 motion to suppress, we must initially determine whether Harms has standing to assert a fourth amendment challenge to the stop at the check stop selective. Both Harms and the State focus on whether Harms, as driver but not owner of the vehicle, has standing to challenge the search of the vehicle. Such inquiry is misplaced. The proper inquiry is whether Harms, as an individual present in the vehicle, has standing to challenge the initial stop of the vehicle.

Other jurisdictions have considered this issue and have reached the conclusion that an occupant in a vehicle will usually have standing to challenge the stop of the vehicle. In *State v. Eis*, 348 N.W.2d 224 (Iowa 1984), the codefendants, who were the driver and the passenger of a vehicle which was stopped by a deputy sheriff, moved to suppress evidence obtained as a result of that stop. The trial court sustained the motion to suppress, and the prosecution sought review in the Iowa Supreme Court.

An issue before the court was whether defendant Dells, as a passenger in the vehicle, had standing to assert a fourth amendment challenge to the stop of the vehicle, which was owned and operated by defendant Eis. Standing would turn on whether Dells had a legitimate expectation of privacy that was invaded when the deputy sheriff stopped the truck in which he was riding. The court stated:

> The Supreme Court decision in *Rakas* [*v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)] does not answer the [standing] question because that case involved a challenge to the searching rather than the stopping of a vehicle. The legality of the stop was not an issue. . . . General principles governing the rights of vehicle

> occupants to challenge stops were discussed in the Court's later decision in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). This court reviewed and applied the *Prouse* principles in *State v. Hilleshiem*, 291 N.W.2d 314, 316-19 (Iowa 1980).
>
> As we noted in *Hilleshiem*, one of the principles recognized in *Prouse* is that the stopping of a vehicle is a seizure of its occupants within the meaning of the fourth amendment. . . . The vehicle occupants have a protected privacy interest in freedom of movement that is invaded when the vehicle is stopped. . . . The Supreme Court made no distinction in *Prouse* between the rights of passengers and those of drivers. The accused in that case may have been a passenger. *See* 440 U.S. at 650 n. 1, 99 S.Ct. at 1394, n. 1, 59 L.Ed.2d at 665. The accused persons in *Hilleshiem* included both drivers and passengers.

Eis at 226.

The court went on to state:

> No principled basis exists for distinguishing between the privacy rights of passengers and drivers in a moving vehicle. When the vehicle is stopped they are equally seized; their freedom of movement is equally affected. We therefore hold that the occupants of motor vehicles, whether drivers or passengers, ordinarily have a legitimate expectation of privacy which is invaded when the vehicle is stopped by the government. This holding presupposes the occupant's rightful presence in the vehicle. Otherwise the privacy expectation is not legitimate. *See Rakas*, 439 U.S. at 143 n. 12, 99 S.Ct. at 430, n. 12, 58 L.Ed.2d at 401.

Eis at 226.

The court noted that "[t]he State acknowledges that courts which have held to the contrary have done so without helpful analysis." *Id.* The court found that Dells had a legitimate expectation of privacy that was invaded by the stop, and thus Dells had the requisite standing to assert a fourth amendment violation. After determining that the vehicle stop was illegal, the court affirmed the trial court's order in sustaining the motion to suppress.

Other jurisdictions have also reached the same result as *Eis*.

In *State v. DeMasi*, 419 A.2d 285 (R.I. 1980), *vacated on other grounds* 452 U.S. 934, 101 S. Ct. 3072, 69 L. Ed. 2d 948 (1981), *cert. denied* 460 U.S. 1052, 103 S. Ct. 1500, 75 L. Ed. 2d 931 (1983), the court held that all occupants of the vehicle had standing to challenge the constitutionality of the stop because "all three shared a legitimate expectation that they would be free from unreasonable governmental intrusion occasioned by the stop, the request for identification, and the warrant check. To hold otherwise here would be to draw artificial, formalistic distinctions not grounded in logic." *DeMasi* at 294. The court went on to point out that not all passengers in a vehicle will automatically have a legitimate expectation of privacy so as to be able to challenge a stop. Such a determination, the court noted, would be made on a case-by-case basis as suggested in *Rakas*.

In *Parkhurst v. State*, 628 P.2d 1369 (Wyo. 1981), *cert. denied* 454 U.S. 899, 102 S. Ct. 402, 70 L. Ed. 2d 216, the court found that a defendant who was a passenger in a vehicle detained by police had standing to challenge the stop because, as a guest in his brother's vehicle, he "could reasonably expect that the car in which he was a guest would be free from state encroachment." *Parkhurst* at 1374.

In *People v. Kunath*, 99 Ill. App. 3d 201, 425 N.E.2d 486 (1981), the court held that the defendant, as an occupant of the vehicle stopped by police, could challenge the stop of the vehicle, since it entailed an infringement of his personal freedom. See, also, *State v. Haworth*, 106 Idaho 405, 679 P.2d 1123 (1984); *State v. Beja*, 451 So. 2d 882 (Fla. App. 1984); *State v. Losee*, 353 N.W.2d 876 (Iowa App. 1984); *State v. Epperson*, 237 Kan. 707, 703 P.2d 761 (1985); *State v. Scott*, 59 Or. App. 220, 650 P.2d 985 (1982), *appeal after remand* 68 Or. App. 386, 681 P.2d 1188 (1984).

We conclude that an occupant of a vehicle will ordinarily have a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop as violative of his fourth amendment rights.

In the present case, we hold that Harms, as an occupant of the pickup which was detained by the State Patrol, had a legitimate expectation to be free of unreasonable governmental

intrusion. He therefore has standing to assert a fourth amendment challenge to the stop of the vehicle.

Having determined that Harms has standing to challenge the stop of the vehicle, we must next determine whether the stop violated Harms' fourth amendment rights. In *State v. One 1987 Toyota Pickup, ante* p. 670, 447 N.W.2d 243 (1989), we determined that the October 23, 1987, check stop selective, conducted by the Nebraska State Patrol, violated Jurgens' fourth amendment rights because the troopers who conducted the check stop selective acted with unconstrained discretion. Jurgens was the registered owner of the pickup and was present with Harms in the vehicle when it was detained at the roadblock. For the reasons set forth in *State v. One 1987 Toyota Pickup*, we hold that Harms was unreasonably seized in violation of the fourth amendment to the U.S. Constitution. Any evidence obtained as a result of that stop is "fruit of the poisonous tree," *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), and is inadmissible. Therefore, the trial court erred in overruling the April 12 motion to suppress.

Harms also contends that it was error for the trial court to overrule the September 8, 1988, motion to suppress as evidence the notebook found in a shed on the Jurgens property. To resolve this contention, we must first determine whether Harms has standing to assert a fourth amendment challenge to the search of the shed. This court has often stated that the capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. See *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986); *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983), *cert. denied* 466 U.S. 906, 104 S. Ct. 1684, 80 L. Ed. 2d 158 (1984); *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981); *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980). We also stated in *Cemper, supra*, that ownership is still a factor to be considered in determining whether a person has a legitimate expectation of

privacy: "Ownership and possessory rights in 'places' are still important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place." *Cemper* at 382, 307 N.W.2d at 823. The critical question, therefore, is whether Harms had a legitimate expectation of privacy in the shed where the notebook was found.

The record discloses that the shed was small and portable, having been mounted on skids. It was never permanently affixed to any real property, but instead was moved to various properties where it remained temporarily. In March 1988, it was moved onto Jurgens' property, where it was located when it was searched. The shed was built in 1978 or 1979 by Jurgens and Harms, using scrap materials from construction jobs. Jurgens and Harms worked as partners in a construction business, and both of them stored tools and personal property in the shed. The shed was kept locked, and only Harms and Jurgens had keys to the lock. When Marshall McDevitt searched the shed, he had to use the services of a locksmith to open the lock and gain access to the shed. Moreover, Harms testified that the shed was owned by both himself and Jurgens.

Based on these facts, it is clear that Harms had a reasonable expectation of privacy in the shed. He therefore has standing to assert a fourth amendment challenge to the search of the shed.

We must next focus on whether the notebook was illegally obtained by the federal marshall. As a threshold question, we must consider whether this evidence, assuming it was illegally seized by federal law enforcement personnel, is admissible in a state court criminal prosecution. If evidence which is illegally obtained by federal officers can be used in state criminal prosecutions, then the question of whether the evidence was illegally seized becomes irrelevant.

In *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed 652 (1914), the Supreme Court established the rule which excluded, in a federal criminal prosecution, evidence obtained by federal agents in violation of the defendant's fourth amendment rights. The Court in *Weeks* also held that the admission of evidence unlawfully seized by local officers acting on their own account was not error because "the Fourth Amendment is not directed to individual misconduct of such

officials. Its limitations reach the Federal Government and its agencies." *Weeks* at 398. On this basis, federal prosecutors were free to use as evidence in federal criminal prosecutions evidence unlawfully seized by state officers. The question soon arose, when prosecutors attempted to introduce into federal criminal proceedings evidence illegally obtained by state officers, whether federal agents had participated in the search and seizure to such an extent as to make the exclusionary rule of *Weeks* applicable. In *Byars v. United States*, 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520 (1927), the Court held that where federal officers participated in the search under color of their federal office, and the search was in effect a joint operation between federal and state officers, the effect is the same as if the federal agents had engaged in conduct solely on their own. In *Lustig v. United States*, 338 U.S. 74, 78-79, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949), the Court stated what has come to be known as the "silver platter" doctrine: "The crux of that doctrine [*Byars*] is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." Later, in *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960), the Court abolished the "silver platter" doctrine, holding that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over the defendant's timely objection in a federal criminal trial. One year later, in *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the Court, in making the exclusionary rule applicable to states, held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." It would appear that *Mapp* would decide the question under consideration here; however, Justice Goldberg, in his concurring opinion in *Cleary v. Bolger*, 371 U.S. 392, 83 S. Ct. 385, 9 L. Ed. 2d 390 (1963), indicated further discussion of the issue has not been totally foreclosed:

> There is a strong interest, which many decisions of this Court reflect [citations omitted], in ensuring compliance

> by federal officers with rules having the force of federal law, designed to safeguard the rights of citizens charged with criminal acts. Whether the Supremacy Clause of the Constitution compels state courts to enforce that interest by excluding evidence obtained by federal officers in violation of the Federal Criminal Rules, including reverse "silver platter" situations wherein illegally procured evidence has been handed over to state officers, will warrant serious consideration in an appropriate case. We need not and therefore do not decide that question here.

Cleary at 404.

The U.S. Court of Appeals for the Second Circuit, citing to *Elkins* and *Byars*, stated that "[e]vidence seized by federal officers in violation of the Fourth Amendment presumably may not be used in a state criminal prosecution, especially when state officers have participated in the unlawful search." *United States v. Fay*, 344 F.2d 625, 629 n.1 (2d Cir. 1965). Similarly, in *The People v. Wilson*, 24 Ill. 2d 425, 430, 182 N.E.2d 203, 205 (1962), the court held that "the State can not divorce itself from [the federal officers'] conduct when it undertakes a prosecution" in a case where all the evidence is secured by or under their direction.

In light of *Mapp* and *Elkins*, we see no logical reason why evidence which is unlawfully seized by federal law enforcement personnel should be admissible in state court criminal prosecutions. We therefore hold that evidence illegally obtained by federal law enforcement personnel cannot be used in Nebraska state courts, provided the lawfulness of the seizure is properly raised and adjudicated.

In the present case, the evidence shows that Marshall McDevitt, acting pursuant to a warrant for arrest in rem, removed a notebook from a shed on the Jurgens property, then handed that notebook over to the Pawnee County sheriff for use in a state court criminal proceeding. There was also some evidence to suggest that the county sheriff was involved in the search which uncovered the notebook. This notebook, unless it can be established that it was legally obtained, cannot be admitted into evidence in Harms' criminal trial.

With regard to a motion to suppress, the burden of going

forward is on the movant to establish a prima facie case of an unconstitutional search and seizure, and when such prima facie case has been established, the burden of going forward shifts to the State to establish that the search and seizure was constitutionally permissible. We stated in *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* 484 U.S. 863, 108 S. Ct. 180, 98 L. Ed. 2d 133, that the burden of proof depends on whether the search was conducted pursuant to a search warrant or without a search warrant:

> If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.

Vrtiska at 461, 406 N.W.2d at 120.

The evidence presented at trial shows that Marshall McDevitt went to the Jurgens farm to execute a "warrant for arrest in rem." The warrant for arrest in rem was captioned "United States of America . . . vs. The North Half of the Northwest Quarter of Section 29, Township 3, North, Range 12, East of the 6th P.M. in Pawnee County, Nebraska, with its Buildings and Appurtenances . . . ." The document commanded the U.S. marshall to "arrest, attach and return until further order of the court the said defendant property with its buildings and appurtenances," and then give proper notice to "all persons claiming the same or knowing or having anything to say why the same should not be condemned and forfeited pursuant to the prayer of said [forfeiture] Complaint . . . ." The document was issued by the U.S. district court clerk.

We conclude this warrant for arrest in rem was not a search warrant. Under federal law, a search warrant must be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located. Fed. R. Crim. P. 41(a). Under Nebraska law, a search warrant may issue after a judge or magistrate determines that probable cause exists to issue the warrant, and the basis upon which the probable cause determination was made must be contained in the search warrant. See Neb. Rev. Stat. § 29-814.04 (Reissue

1985). The evidence in this case shows that the warrant for arrest in rem was issued by a district court clerk, not by a magistrate or judge. Nor does the evidence show that the warrant was issued after a probable cause determination. Moreover, "in rem" is defined as "against or with respect to a thing (as a right, status, or title to property)." Webster's Third New International Dictionary, Unabridged 1167 (1981). A proceeding in rem is one which is taken directly against property or one which is brought to enforce a right in the property. This warrant concerns the rights the government has in certain real property owned by Jurgens. Based on these facts, we hold the document entitled "warrant for arrest in rem" is not a search warrant.

Because the federal marshall acted without a search warrant, the State has the burden of proving that the search of the shed was lawful. The sole evidence adduced at the suppression hearing concerned Harms' reasonable expectation of privacy in the shed. The State presented no evidence. The trial judge waited to rule on the motion to suppress until after Marshall McDevitt and Sheriff Schulze testified at trial. We note that it is clearly the intention of Neb. Rev. Stat. § 29-822 (Reissue 1985) that motions to suppress evidence are to be ruled on and finally determined before trial, unless the motion is within the exceptions contained in the statute. See *State v. Pope*, 192 Neb. 755, 224 N.W.2d 521 (1974). It is the preferable practice that the trial judge rule on motions to suppress before trial begins. In any event, even considering the testimony of Sheriff Schulze and Marshall McDevitt which was presented at trial, the State did not carry its burden of proving the lawfulness of the search. In sum, Marshall McDevitt testified that he went to the Jurgens farm to serve a warrant for arrest in rem and that he had no other warrants or instructions signed by a federal judge authorizing him to seize personal property on the real estate. He also testified that he was not sure if the warrant for arrest in rem authorized him to seize personal property located on the real property. Sheriff Schulze merely testified as to the notebook's chain of custody after McDevitt turned it over to him. The entire record contains absolutely no evidence to even suggest that a warrant for arrest in rem authorizes law enforcement

personnel to search and remove personal property from the real estate described in the warrant. The State did not even attempt to prove that the warrant for arrest in rem was lawfully issued by the clerk of the federal district court, nor does the record reflect under what authority, statutory or otherwise, the warrant was issued. In the face of this total absence of evidence, we can only conclude that the State did not meet its burden of proving the lawfulness of the search. Therefore, the trial court erred in overruling the September 8 motion to suppress.

We cannot say the error in overruling the motions to suppress was harmless beyond a reasonable doubt. The notebook could link Harms to the marijuana found on the farm. The error is properly characterized as trial error, which does not bar retrial after this reversal. See *State v. Chambers, ante* p. 235, 444 N.W.2d 667 (1989). Accordingly, Harms' convictions are reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. KURT TANNER, APPELLANT.
448 N.W.2d 586

Filed December 1, 1989. No. 88-1038.

Trial: Evidence. Where evidence necessary to conduct tests or analyses by the defense is unavailable due to the neglect or intentional alteration by the State, suppression of the test results at trial is the exclusive remedy under Neb. Rev. Stat. § 29-1913(2) (Reissue 1985).

Appeal from the District Court for Nemaha County, ROBERT T. FINN, Judge, on appeal thereto from the County Court for Nemaha County, THOMAS J. GIST, Judge. Judgment of District Court affirmed.

Louie M. Ligouri for appellant.

Robert M. Spire, Attorney General, and David Edward Cygan for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

After a trial to the court, the defendant, Kurt Tanner, was found guilty of driving while under the influence of alcoholic liquor. The defendant was sentenced to probation for a term of 1 year. Upon appeal to the district court, the judgment was affirmed.

The defendant has now appealed to this court and contends that there was insufficient evidence to find him guilty beyond a reasonable doubt and that the trial court erred in overruling his motion to dismiss. We affirm.

At 11:20 p.m. on May 19, 1988, after hearing a "squealing noise" coming from Tanner's vehicle, Deputy Sheriff James Haith stopped the vehicle. Upon approaching the driver and requesting him to produce his driver's license, Deputy Haith smelled alcohol on Tanner's breath and observed an open 12-pack beer container inside the vehicle. He also noticed that a passenger in the vehicle had a can of beer in his hand.

Deputy Haith requested Tanner to perform several field sobriety tests, which Tanner failed. Tanner was then arrested, and a blood sample was subsequently taken from him for later analysis.

A complaint was filed on May 31, 1988, charging Tanner with operating a motor vehicle while under the influence of alcoholic liquor or of any drug, or while having a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of his blood.

On July 11, 1988, Tanner filed a motion for discovery, requesting that the blood sample be made available to him for further testing. On July 19 at a hearing on this motion, the trial judge ordered the prosecution to make the sample available to a lab of the defendant's choice. After the State failed to comply with this order, the defendant, on July 25, moved to dismiss the case. At a hearing on this motion on August 11, the county attorney stated that the prosecution could not comply with the order because the blood sample had coagulated prior to or during the initial testing and was thus unsuitable for accurate

testing. An initial test of the coagulated blood showed a .173 blood-alcohol content. The prosecution further stated that because of the unreliability of the blood sample, it would not use the test results in prosecuting its case. Tanner made no further request to have the State produce the sample so its condition could be verified by his lab. After noting that the proper remedy under Neb. Rev. Stat. § 29-1913 (Reissue 1985) would be to exclude the evidence, the trial court denied the motion to dismiss.

Also at this hearing, the State was granted leave to amend the complaint to allege only that Tanner was operating a motor vehicle while under the influence of alcoholic liquor.

After a bench trial on August 25, in which the State's only evidence was the testimony of Deputy Haith, Tanner was found guilty on the amended complaint.

On appeal, Tanner first contends that there was insufficient evidence to find him guilty beyond a reasonable doubt. In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Swift, ante* p. 55, 443 N.W.2d 613 (1989); *State v. Washington*, 232 Neb. 838, 442 N.W.2d 395 (1989); *State v. Auman*, 232 Neb. 341, 440 N.W.2d 254 (1989). Moreover, this court has previously held that a police officer's opinion testimony, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol. See, *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987); *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977). "As used in § 39-669.07, the phrase 'under the influence of alcoholic liquor' means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner." *State v. Burling, supra* at 728, 400 N.W.2d at 875.

At trial, Deputy Haith testified that he has investigated approximately 24 driving while intoxicated cases since the beginning of 1988, that during his law enforcement training he received instruction on DWI procedures and field sobriety tests, and that he has observed the conduct of people who have consumed alcohol. He testified that upon asking Tanner for his operator's license, he smelled alcohol on Tanner's breath and observed an open 12-pack container in Tanner's vehicle. Deputy Haith further testified that Tanner failed the three field sobriety tests that he requested Tanner to perform. He also stated on direct examination that based upon the field sobriety tests, it was his opinion that Tanner was driving under the influence of alcoholic liquor.

Taking the view most favorable to the State, Deputy Haith's testimony, which was based on his observations of Tanner, provides sufficient evidence to support Tanner's conviction for operating a motor vehicle while under the influence of alcoholic liquor. Tanner's first assignment of error is without merit.

Tanner next contends that the trial court erred in overruling his motion to dismiss, which was made after the State failed to comply with the discovery order. Section 29-1913(2) provides:

> If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority, other than alterations necessary to conduct the initial tests, the tests or analyses by the prosecuting authority shall not be admitted into evidence.

The record is unclear as to the cause of the coagulation and the point at which the sample coagulated. Whether the coagulation was due to the neglect or intentional alteration by the State, the penalty is exclusion of the evidence. The statute does not provide for dismissal as a remedy. The trial court applied the only available remedy under § 29-1913(2) by suppressing the test results. *State v. Brodrick*, 190 Neb. 19, 205 N.W.2d 660 (1973). We further note that the failure to preserve evidence potentially useful to the defendant does not violate the 14th amendment due process clause unless the defendant shows that the officers acted in bad faith in destroying the evidence. *Arizona v. Youngblood*, ____ U.S. ____, 109 S. Ct. 333, 102 L.

Ed. 2d 281 (1988). "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood, supra* at 109 S. Ct. at 337 n.1. It is not enough that the unavailable evidence could have exculpated the defendant if preserved; the exculpatory value of the evidence must be apparent before the evidence was destroyed. *Youngblood, supra.*

In the present case, Tanner has made no such showing. An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal. *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988). Moreover, because Tanner did not demand that the sample be produced by the State so that its condition could be verified by his experts once it was learned that the sample had coagulated, he waived its production. The second assignment of error is without merit.

AFFIRMED.

SHANAHAN, J., concurring.

Although the majority speaks in terms of physical evidence "destroyed" by the State or evidence which has become unavailable through the State's neglect or intentional alteration, Tanner's claim involves existing physical evidence which was available for scientific evaluation. Thus, much in the mode of the Wildean observation that some historians write about events which never occurred, Tanner's appeal has been disposed by some legal principles which are inapplicable.

As noted, Tanner was charged with violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987), the offense of drunk driving or one's operating a motor vehicle while such operator has a "concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of [the operator's] blood," or while such operator is "under the influence of alcoholic liquor," that is, "intoxicated," which means that as the result of drinking alcohol, the operator of a motor vehicle experiences an appreciable loss of normal control over bodily and mental faculties during operation of the vehicle. See *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983).

In conjunction with Tanner's arrest for drunk driving, the

State contemporaneously obtained a sample of Tanner's blood as evidence to prove the offense charged. In prosecutions for felonies and misdemeanors punishable by imprisonment, which includes drunk driving in Nebraska, a defendant may request certain physical evidence, such as a sample of the defendant's blood which the State has acquired, and obtain the physical evidence from the State for independent testing by the defendant's expert, subject to appropriate safeguards imposed by the trial court. See Neb. Rev. Stat. § 29-1913(1) (Reissue 1985). Thus, pursuant to § 29-1913(1), as a part of the discovery process provided in Nebraska criminal procedure, the defendant, by timely motion in a trial involving jeopardy to a defendant's liberty, is entitled to have an expert of the defendant's selection, but subject to appropriate safeguards imposed by the trial court, independently examine, test, or analyze physical evidence which is in the State's custody or possession and which may be subject to varying expert opinion. *State v. Adkins*, 280 S.E.2d 293 (W. Va. 1981); *Sabel v. State*, 248 Ga. 10, 282 S.E.2d 61 (1981); *State v. Davis*, 399 So. 2d 1168 (La. 1981); *People v White*, 40 N.Y.2d 797, 358 N.E.2d 1031, 390 N.Y.S.2d 405 (1976). If there is relevant evidence presented establishing that a valid scientific test cannot be performed on physical evidence which is subject to the discovery process in a criminal proceeding, a court may deny a defendant's request that physical evidence be independently examined, tested, or analyzed by the defendant's expert. *Roberts v. State*, 243 Ga. 604, 255 S.E.2d 689 (1979).

On July 19, 1988, pursuant to Tanner's discovery motion under § 29-1913(1), the court ordered the State to produce the sample of Tanner's blood for testing by Tanner's expert. Without any intervening action by the court or change in the situation, as far as the record reflects, on July 21 the prosecutor, notwithstanding the existing discovery order for production of Tanner's blood sample for testing by Tanner's expert, filed a "supplemental reply" to Tanner's discovery motion and, for the first time, claimed and alleged that Tanner's blood sample had "clotted during the initial testing" and, therefore, "the blood sample in the possession of the State of Nebraska is not suitable for further testing." At a hearing on August 11, the State

offered no proof to substantiate the allegations in its supplemental reply to Tanner's discovery motion. Instead, as the majority notes, the prosecutor represented to the court that "the blood sample had coagulated *prior to* or during the initial testing and was thus unsuitable for accurate testing," but that the "initial test of the coagulated blood showed a .173 blood-alcohol content." (Emphasis supplied.) It is peculiar to the point of absolutely amazing that if, as the majority recounts, Tanner's blood sample had coagulated before the State's test on the sample, the State, nonetheless, achieved "[a]n initial test of the coagulated blood [which] showed a .173 blood-alcohol content." Yet, the State maintained that Tanner's coagulated blood sample was unsuitable for testing. Quite obviously, coagulation never impeded or prevented testing by the State. Apparently, the State tested the coagulated sample of Tanner's blood, which, after the State's testing, coagulated even further so that any additional testing was "unsuitable" or impossible. Such a bloody phenomenon, although perhaps a scientific possibility, boggles the mind of those untrained in serology.

Although the State discarded the claim that Tanner operated a motor vehicle while he had a blood-alcohol concentration of "ten-hundredths of 1 gram," there remained the allegation that Tanner was "under the influence of alcoholic liquor" or intoxicated when he was driving the vehicle. After an appropriate test or analysis of Tanner's blood sample and a determination of the alcohol level in Tanner's blood at the time of his arrest, an expert would have scientific information as the basis for an opinion whether Tanner was intoxicated during operation of the vehicle. Whether Tanner's blood sample, which was admittedly in the State's possession, would have afforded such information was ostensibly unknown to the trial court and, with due deference, is most likely unknown to this court. Regarding the sample of Tanner's blood, susceptibility to testing and analysis rested in the province of an expert and not in the prosecutor's unsubstantiated assertions. When an individual's liberty is jeopardized by prosecution for a criminal offense, proof, not a prosecutor's palaver, should govern the outcome. Without relevant information for the exercise of an

independent determination necessary for the efficacious discovery process in criminal cases, especially under circumstances such as those present in Tanner's case, a trial court is reduced to the status of a forensic functionary for a prosecutor.

Consequently, the more plausible solution to the problem presented in Tanner's appeal would be the production of Tanner's blood sample, which was in the State's possession, for testing by Tanner's expert to determine whether the blood sample had any scientific value. If Tanner's expert concluded that the blood sample had become unsusceptible for testing due to the State's neglect or intentional alteration, the trial court, on acceptance of the conclusion by Tanner's expert, would be in a position to decide what action should be taken as a consequence of the State's impropriety concerning the blood sample. In all this, the fact remains that in accordance with the right to discovery under § 29-1913(1) concerning production and independent testing or analysis of physical evidence in the State's possession, the discovery process in criminal cases and the order for production in Tanner's case should not have been frustrated or thwarted by the State's conduct displayed in the case now before us.

Next, the majority states: "Moreover, because Tanner did not demand that the sample be produced by the State so that its condition could be verified by his experts once it was learned that the sample had coagulated, he waived its production." The implication is that once the State asserted that Tanner's blood sample had coagulated, Tanner, at the risk of waiving the avails of the previous and existing production order, was required to demand production of the allegedly coagulated blood sample. In short, according to the majority, Tanner had to make the additional request that the State comply with the court's existing discovery order—a request that one bound by a court's order comply with the order. If one disregards the legal redundancy inherent in the necessity of a request for a court's order to comply with the court's previous order, Tanner's conduct, nevertheless, constituted a waiver of his right to production of the blood sample. "A waiver is the voluntary and intentional relinquishment of a known right, privilege, or

claim, and may be demonstrated by or inferred from a person's conduct." *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986). By not standing on discovery rights under the court's existing order and by proceeding to trial without objection in the face of the State's failure to comply with the discovery order, which authorized independent testing by Tanner's expert, Tanner waived the discovery order and his right to complain on account of the State's noncompliance with the order. See, *Butler v. Pettigrew*, 409 F.2d 1205 (7th Cir. 1969); *Price v. Maryland Cas. Co.*, 561 F.2d 609 (5th Cir. 1977); *Reuber v. United States*, 787 F.2d 599 (D.C. Cir. 1986); *Lapenna v. Upjohn Co.*, 110 F.R.D. 15 (E.D. Pa. 1986). As the result of Tanner's waiver, there is no error to be reviewed regarding the trial court's conduct in not enforcing its discovery order that the State produce Tanner's blood sample for testing by Tanner's expert.

Thus, I agree with the majority's conclusion that the evidence supports Tanner's conviction, but disagree with the majority's explanation that Tanner's assignment of error concerning production of the blood sample is without merit. However, as the result of Tanner's waiver of the discovery order, the district court's judgment, affirming Tanner's conviction, should be affirmed.

CAPORALE and GRANT, JJ., join in this concurrence.

MARLYN J. MUSIL, APPELLEE AND CROSS-APPELLANT, V. J.A. BALDWIN MANUFACTURING COMPANY, APPELLANT AND CROSS-APPELLEE.

448 N.W.2d 591

Filed December 1, 1989. No. 89-155.

1. **Workers' Compensation.** When a worker has reached maximum recovery, the remaining disability is permanent and such a worker is no longer entitled to compensation for temporary disability.
2. **Workers' Compensation: Attorney Fees: Time.** Where there is no reasonable

controversy regarding an employee's entitlement to workers' compensation, Neb. Rev. Stat. § 48-125 (Reissue 1988) authorizes award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent payments, and the worker is entitled to recover interest on the payments which have accrued at the time payment is made by the employer.

3. _____: _____: _____. To avoid the payments assessable under Neb. Rev. Stat. § 48-125 (Reissue 1988), an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
4. **Workers' Compensation.** Although the total amount of compensation may be in dispute, the employer has a duty to promptly pay any undisputed compensation, and the only legitimate excuse for delay of compensation is the existence of genuine doubt from a medical or legal standpoint that any liability exists.
5. _____. Compensation for permanent partial disability to the body as a whole is compensated on the basis of loss of earning capacity and employability rather than functional or medical loss.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

William J. Ross, of Ross, Schroeder & Brauer, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The plaintiff, Marlyn J. Musil, was injured on October 29, 1984, in an accident arising out of and in the course of her employment as a heavy duty welder by the defendant, J.A. Baldwin Manufacturing Company. The plaintiff claims the accident resulted in injury to her left shoulder, neck, and arm. Her average weekly wage at the time of the accident was $288. The plaintiff continued working after the accident until March 24, 1986.

The defendant paid compensation to the plaintiff for temporary total disability from March 29, 1986, through February 29, 1988. This action was commenced on March 30, 1988, to recover additional compensation under the Nebraska Workers' Compensation Act.

After the hearing before a single judge, the plaintiff

recovered an award for temporary total disability from March 1, 1985, through June 13, 1988, and for a 35-percent permanent loss of earning power thereafter, together with medical expenses; a penalty for waiting time from February 19, 1988, to June 13, 1988; attorney fees and interest; and the right to request vocational rehabilitation.

On rehearing, the plaintiff recovered an award for total disability from March 24, 1986, to the date of the rehearing and thereafter until her total disability ceases. The compensation court further found that the plaintiff presently had suffered a total loss of earning power; that the plaintiff was not physically capable of participating in a plan of vocational rehabilitation; that there was no reasonable controversy; and that the plaintiff should recover $5.76 per week as additional compensation from February 29, 1988, and attorney fees, deposition expenses, and medical expenses. From that award, the defendant has appealed.

The defendant contends that the compensation court erred in awarding compensation for temporary total disability and attorney fees and costs on the rehearing.

The plaintiff has cross-appealed, contending that the compensation court incorrectly computed the penalty due the plaintiff.

The principal controversy in this case is whether the plaintiff is entitled to recover compensation for temporary total disability after March 24, 1986. The defendant contends that the undisputed evidence shows that the plaintiff has reached maximum medical improvement and, therefore, cannot be temporarily totally disabled.

In *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989), we held that when a worker has reached maximum recovery, the remaining disability is permanent and such a worker is no longer entitled to compensation for temporary disability. If the plaintiff in this case has reached maximum recovery from the October 29, 1984, accident, she is no longer entitled to compensation for temporary total disability, but is entitled to compensation for whatever permanent disability she has.

The plaintiff has received a variety of treatments for the

injury she sustained, including surgery on at least two occasions, medication, and physical therapy. The medical evidence shows that although the plaintiff has good motion in her shoulder, she has little use of her left arm because of pain. She is unable to lift any weight of consequence and cannot perform repetitive motions with the arm.

On January 30, 1988, Dr. Robert T. Urban reported that the plaintiff had "very little use of the left upper extremity"; had constant pain with motion and at rest; was barely able to use her arm in self-care; could lift only 2 to 5 pounds, but not in a repetitive fashion; and could do no overhead work. Dr. Urban estimated her disability to be 22 percent to the body as a whole.

In his February 25, 1988, report, Dr. Urban described the plaintiff's condition as "chronic pain syndrome in the upper extremity."

In her report on June 13, 1988, Dr. Jan C. Weber stated that the plaintiff's diagnosis was "musculoskeletal neck pain and fibromyositis. It appears to be a chronic condition that will remain the same. It is unlikely that anything can be done to alleviate her pain in the hand and left shoulder as she has been through rehabilitation." On August 25, 1988, Dr. Weber reported, "Maximum healing was achieved in June 1988 after she had no further benefit from physical therapy. It appears to me that she has not changed much since Dr. Urban gave her a 20% whole body disability rating. I would give her a rating somewhat lower than this at 15%."

Dr. Gary L. Chingren reported on September 8, 1988, that "I would feel she has a not greater than 10 percent permanent physical impairment and loss of physical function to the whole arm from her shoulder injury." On September 21, 1988, Dr. Chingren reported that the plaintiff's "10 percent impairment of the upper extremity is extrapolated to a 6 percent whole person physical impairment."

The medical evidence may be summarized by stating that there is considerable evidence that the plaintiff has reached her maximum recovery and that there is no substantial evidence that further treatment will result in an improvement in her condition. There is no substantial evidence to support a finding that her disability continues to be temporary in nature. The

cause must, therefore, be remanded to the compensation court for a determination as to the nature and extent of the plaintiff's permanent disability and an award of the compensation to which she is entitled.

With regard to the defendant's second assignment of error, the evidence supports the finding of the compensation court that there is no reasonable controversy as to the plaintiff's being disabled and that she is entitled to attorney fees, interest, and the 50-percent penalty for waiting time for payments of compensation which are due but unpaid.

As we stated in *Roesler v. Farmland Foods*, 232 Neb. 842, 442 N.W.2d 398 (1989), "As is well known, where there is no reasonable controversy regarding an employee's entitlement to workers' compensation, Neb. Rev. Stat. § 48-125 (Reissue 1988) authorizes award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent payments." And, as contended by the plaintiff in her cross-appeal, the worker is entitled to recover interest on the payments which have accrued at the time payment is made by the employer. § 48-125(2).

Although there is a controversy in regard to the nature and extent of the plaintiff's permanent disability, there is no evidence to support a contention that the plaintiff has no permanent disability. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

In 3 A. Larson, The Law of Workmen's Compensation § 83.41(c) at 15-1433 to 15-1435 (1989), the author states:

> If bona fide settlement negotiations accompany the nonpayment of compensation, this may purge the delay or refusal of unreasonableness, but the fact that some settlement offer has been made is not necessarily a defense. A question that has arisen in several jurisdictions is whether a penalty should apply when the employer admits liability for a lesser amount than that claimed, but pays nothing. *It is usually held that the employer should*

> *have paid at least the amount for which liability was undisputed, and that a penalty is therefore warranted.*

(Emphasis supplied.)

In *Holton v. F.H. Stoltze Land Lbr. Co.*, 195 Mont. 263, 637 P.2d 10 (1981), the court held that although the total amount of compensation may be in dispute, the employer's insurer has a duty to promptly pay any undisputed compensation, and that the only legitimate excuse for delay of compensation is the existence of genuine doubt from a medical or legal standpoint that any liability exists. See, also, *Berry v. Workmen's Comp. App. Bd.*, 276 Cal. App. 2d 381, 81 Cal. Rptr. 65 (1969); *Lethermon v. American Insurance Company*, 129 So. 2d 507 (La. App. 1961); *Dufrene v. St. Charles Parish Police Jury*, 371 So. 2d 378 (La. App. 1979); *Bradley v. Mercer*, 563 P.2d 880 (Alaska 1977).

In this case, the defendant's insurance carrier wrote to the plaintiff on March 1, 1988, offering a lump-sum settlement based on Dr. Urban's estimate of 22 percent disability to the body as a whole. The offer, however, failed to take into account that compensation for permanent partial disability to the body as a whole is compensated on the basis of loss of earning capacity and employability rather than functional or medical loss. Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1988). There is substantial evidence that if the plaintiff's permanent disability is to her body as a whole, as opposed to a schedule injury, her disability is in excess of 22 percent.

But instead of paying compensation to the plaintiff for some amount of permanent partial disability, the defendant has paid no compensation to the plaintiff since February 29, 1988. Under these circumstances, the plaintiff is entitled to attorney fees; the 50-percent penalty for waiting time; and interest on all payments which have accrued, until the date they are paid.

The judgment of the compensation court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V. CHARLES A. COMEAU, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. LARRY L. RUSH, APPELLEE.

448 N.W.2d 595

Filed December 1, 1989. Nos. 89-186, 89-187.

1. **Constitutional Law: Statutes: Presumptions: Proof.** A statute is presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking its validity.
2. **Constitutional Law: Statutes: Proof.** Unconstitutionality must be clearly established before a statute will be declared void.
3. **Constitutional Law: States: Statutes.** The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.
4. **Constitutional Law.** The constitutional right to keep and bear arms is not absolute.
5. **Constitutional Law: Statutes.** The constitutional right to keep and bear arms is subject to reasonable regulation by statute if the statute does not frustrate the guarantee of the constitutional provision.
6. _____: _____. Neb. Rev. Stat. § 28-1206 (Reissue 1985) is held not to be invalid as in conflict with article I, § 1, of the Constitution of Nebraska.
7. _____: _____. Neb. Rev. Stat. § 28-1207 (Reissue 1985) is held not to be invalid as in conflict with article I, § 1, of the Constitution of Nebraska.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY and DONALD E. ROWLANDS II, Judges. Exceptions sustained, and causes remanded for further proceedings.

Robert M. Spire, Attorney General, and William L. Howland, and Kent D. Turnbull, Lincoln County Attorney, and John H. Marsh for appellant.

Kent E. Florom, Lincoln County Public Defender, for appellees.

Robert I. Eberly and Robert Dowlut for amici curiae National Rifle Association of America and Nebraska Rifle and Pistol Association.

Jerry Soucie for amicus curiae Nebraska Criminal Defense Attorneys Association.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

These cases involve an interpretation and application of the "Right to Bear Arms" amendment to the Nebraska Constitution, which was proposed by the initiative process and adopted at the general election on November 8, 1988. Article I, § 1, of the Constitution of Nebraska, as amended, now provides as follows:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

In case No. 89-186, the defendant, Charles A. Comeau, was charged with possessing a firearm from which the manufacturer's identification marks or serial numbers had been removed, defaced, altered, or destroyed. The defendant filed a "demurrer" which alleged that the information failed to state a crime because Neb. Rev. Stat. § 28-1207 (Reissue 1985), under which the defendant was being prosecuted, was now unconstitutional. Treating the demurrer as a motion to dismiss, the trial court sustained it and dismissed the information.

In case No. 89-187, the defendant, Larry L. Rush, was charged, as a habitual criminal, with being a felon in possession of a firearm having a barrel less than 18 inches in length. The defendant filed a "demurrer" which alleged that the information failed to state a crime because Neb. Rev. Stat. § 28-1206 (Reissue 1985), under which the defendant was being prosecuted, was now unconstitutional. Treating the demurrer as a motion to dismiss, the trial court sustained it and dismissed the information.

The State then commenced proceedings under Neb. Rev. Stat. § 29-2315.01 (Reissue 1985) to review the orders dismissing the informations. In this court the cases have been

consolidated for briefing and argument.

It is fundamental that a statute is presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking its validity. *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987). Unconstitutionality must be clearly established before a statute will be declared void. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

Essentially, the question presented by these appeals is whether the amendment prevents the Legislature from passing any laws regulating the possession of firearms.

The defendants contend that the amendment must be read literally and that the language which states that the right to keep and bear arms is "inalienable" and shall not be "infringed" by state statute or local ordinance prevents any regulation by the Legislature of the right to possess arms. The defendants concede that the use of weapons may be regulated, but argue that mere possession may not be.

The State contends that the plain meaning of the amendment is that the right to keep and bear arms is limited to "lawful purposes." Lawful purposes are not defined in the amendment except as "for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes . . . ." The State argues that in the exercise of the police power, the Legislature may define what purposes are lawful purposes.

The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare. *Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm.*, 217 Neb. 487, 351 N.W.2d 701 (1984).

There are very few rights which are absolute, and this is of necessity. In every phase of everyday experience, there are extremes beyond which some restraint or regulation is necessary for the common good.

Even in those cases where statutes have been held to be invalid because in conflict with a constitutional provision concerning the right to keep and bear arms, many courts have

recognized that the right is not absolute. In *City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988), in which the Supreme Court of Appeals of West Virginia held a statute requiring a license to carry certain weapons invalid, the court said:

> The question remains whether the State may reasonably regulate the right of a person to keep and bear arms in this State.
>
> We stress that our holding above in no way means that the right of a person to bear arms is absolute. *See* cases cited *infra* at p. 146. Other jurisdictions concluding that state statutes or municipal ordinances have violated constitutional provisions guaranteeing a right to bear arms for defensive purposes, though not specific in what ways this is to be done, have recognized that a government may regulate the exercise of the right, provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision. *See, e.g., In Re Brickey*, 8 Idaho 597, 599, 70 P. 609, 609 (1902); *City of Las Vegas v. Moberg*, 82 N.M. 626, 627, 485 P.2d 737, 738 (Ct.App.1971). Particularly, on three occasions, the Supreme Court of Oregon, in striking statutes as violative of the state's constitutional right to bear arms, has repeatedly stressed that the court's holdings should not be construed to mean that an individual has an "unfettered right" to *possess* or use constitutionally protected arms in any way he chooses. The Oregon court has consistently emphasized that the legislature may regulate such *possession* and use. *State v. Delgado*, 298 Or. at 403, 692 P.2d at 614; *State v. Blocker*, 291 Or. at 259, 630 P.2d at 826; *State v. Kessler*, 289 Or. at 370; 614 P.2d at 99.
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> . . . .
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> Our research has revealed that courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens. *See, e.g., Bristow v. State*, 418 So.2d 927, 930 (Ala.Crim.App.),

cert. denied (Ala.1982); *People v. Blue*, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *In re Atkinson*, 291 N.W.2d 396, 399 (Minn.1980); *State v. Angelo*, 3 N.J.Misc. 1014, 1015, 130 A. 458, 459 (1925); *State v. Dees*, 100 N.M. 252, 254-55, 669 P.2d 261, 263-64 (Ct.App.1983); *Commonwealth v. Ray*, 218 Pa.Super. 72, 79, 272 A.2d 275, 279 (1970); *Carfield v. State*, 649 P.2d 865, 871 (Wyo.1982). We stress, however, that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved. *City of Lakewood, supra.*

At least forty-two jurisdictions have constitutional provisions guaranteeing a right to bear arms; however, most are distinguishable from art. III, § 22 either in their failure to specifically recognize the right to self-defense, or in their express recognition that the constitutional provision is subject to legislative regulation. *See* R. Dowlut & J. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U.L.Rev. 177, 236-240 (1982). The State, in the appendix to its brief, cites thirteen states which, like art. III, § 22, grant a rather broad, unrestrictive right to bear arms for the defense of self and the state. With the exception of Vermont, which imposes no significant regulation, the remaining jurisdictions regulate the ownership and use of arms in general, particularly handguns.

Again excluding Vermont, certain statutory regulations are common to most of the jurisdictions having constitutional provisions comparable to West Virginia's. For instance, *the prohibition against the possession or ownership of handguns by persons previously convicted of a felony or other specified crime is widely accepted.* Four states prohibit the open or concealed carrying of handguns without a license or permit; several others specifically prohibit carrying a concealed handgun without a license, while at least one of these jurisdictions, namely, Arizona, further prohibits carrying a handgun in

> public establishments or certain specified public places.
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> . . . .
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> Based upon the foregoing, we conclude that the right to keep and bear arms guaranteed by *W. Va. Const.* art. III, § 22 is not unlimited. The individual's right to keep and bear arms and the State's duty, under it [sic] police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced. *See People v. Blue*, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975). Accordingly, the West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the *West Virginia Constitution*, known as the "Right to Keep and Bear Arms Amendment."

(Emphasis supplied.) 377 S.E.2d at 145-49.

If the use of arms is subject to regulation, then regulation of the right to possession may be the only practical way to make an effectual regulation of the use. For example, if the use of arms by persons of unsound mind is to be prohibited, probably the only effectual way to prevent their use is to prohibit the possession of arms by such persons.

It is well known that the identification and tracing of a weapon is an important factor in solving crimes involving the use of a weapon. It is for that reason that identifying marks are sometimes removed from weapons. It would be of little use to prohibit the *use* of weapons from which identifying marks have been removed if the possession of such weapons is lawful. The most effective way to prevent the use of such weapons is to prohibit their possession. Similarly, the most effective way to prevent the use of handguns by felons is to prohibit the possession of handguns by felons.

We think the better view is that reasonable regulation of the possession of arms is not prohibited by the amendment.

In *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975), the Supreme Court of Colorado held that a statute prohibiting

possession of guns by persons convicted of a felony was not invalid under a constitutional provision guaranteeing the right to bear arms. The Colorado constitutional provision was as follows:

> The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Colo. Const. art. II, § 13.

The Colorado court said:

> It is argued that the statute, which prohibits possession, use, and carrying of a weapon, is a blanket proscription that cannot be reconciled with the literal constitutional language. A felon is a "person" within the meaning of Article II, Section 13, the argument runs, and once he has served his term he is reinstated to the full rights of citizenship, *Colo. Const.* Art. VII, Sec. 10, including the absolute right to bear arms.
>
> However, not all constitutional rights are absolute. *Mosgrove v. Town of Federal Heights*, 190 Colo. 1, 543 P.2d 715; *Stapleton, Jr. v. Dist. Ct.*, 179 Colo. 187, 499 P.2d 310; *Anderson v. People*, 176 Colo. 224, 490 P.2d 47, *cert. denied*, 405 U.S. 1042, 92 S.Ct. 1316, 31 L.Ed.2d 583; *United States v. Akeson*, 290 F. Supp. 212 (D. Colo. 1968); *Sigma Chi Fraternity v. Regents of the University of Colorado*, 258 F. Supp. 515 (D. Colo. 1966). When rights come into conflict, one must of necessity yield. The conflicting rights involved here are the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people. *Cottrell v. Teets*, 139 Colo. 558, 342 P.2d 1016; *Denver v. Denver & Rio Grande Co.*, 63 Colo. 574, 167 P. 969, *aff'd* 250 U.S. 241, 39 S.Ct. 450, 63 L.Ed. 958; *The People v. Hupp*, 53 Colo. 80, 123 P. 651.
>
> We do not read the Colorado Constitution as granting an absolute right to bear arms under all situations. It has limiting language dealing with defense of home, person,

> and property. These limitations have been recognized by the General Assembly in the enactment of section 18-12-105, C.R.S. 1973, which restricts the right to bear arms in certain circumstances, while permitting in other circumstances the carrying of a concealed weapon in defense of home, person, and property, and also when specifically authorized by written permit.
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> In our view, the statute here is a legitimate exercise of the police power.
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> "* * * To limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power." *People v. Trujillo*, 178 Colo. 147, 497 P.2d 1.
>
> *See also People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379. To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections. *Lakewood v. Pillow, supra*; *People v. Hinderlider*, 98 Colo. 505, 57 P.2d 894; *Platte Etc., C. & M. Co. v. Dowell*, 17 Colo. 376, 30 P. 68, *appeal dismissed*, 154 U.S. 512, 14 S.Ct. 1150, 38 L.Ed. 1079. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession.

190 Colo. at 102-03, 544 P.2d at 390-91.

In *State v. Ricehill*, 415 N.W.2d 481 (N.D. 1987), the Supreme Court of North Dakota held that a statute prohibiting possession of firearms by convicted felons did not violate that state's constitutional guarantee of the right to keep and bear arms.

The constitutional provision was as follows:

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness;

and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. Const. art. I, § 3.

The North Dakota court stated:

> Ricehill argues that the right to bear arms is absolute. He argues that the language of the provision states that the right to bear arms "shall not be infringed," and that this means that the Legislature may place no limits on the possession of arms. We disagree with such a broad reading of the provision. Instead, we believe our Constitution's protection of the right to keep and bear arms is not absolute; although it prevents the negation of the right to keep and bear arms, that right nevertheless remains subject to reasonable regulation under the State's police power. As the Michigan Supreme Court stated in construing that State's right to bear arms, "regardless of the basis of the right to bear arms, the State, nevertheless, has the police power to reasonably regulate it." *People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931).
>
> In this case the Legislature prohibited the possession of firearms by persons who have previously committed serious crimes. It is patently reasonable for the Legislature to conclude that it is protecting the public welfare by enacting legislation that keeps firearms out of the hands of people who have shown a disposition to harm others. The Louisiana Supreme Court stated, in rejecting a State constitutional right-to-bear-arms challenge to its prohibition against possession of a firearm by a felon under a police-power rationale:
>
> "It is beyond question that the statute challenged in the instant case was passed in the interest of the public and as an exercise of the police power vested in the legislature. Its purpose is to limit the possession of firearms by persons who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity." *State v. Amos*, 343 So.2d 166, 168

(La. 1977).

415 N.W.2d at 483. The North Dakota court also cited *People v. Blue,* 190 Colo. 95, 544 P.2d 385 (1975), with approval.

We conclude that the statutes in question are reasonable regulations of the right to keep and bear arms and the judgments dismissing the informations were erroneous. Since the defendants have not been placed in jeopardy, the cause in each case is remanded for further proceedings.

EXCEPTIONS SUSTAINED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

MUTUAL OF OMAHA, APPELLEE, V. RAYMOND BROUSSARD, APPELLANT.

448 N.W.2d 600

Filed December 1, 1989. No. 89-190.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Appeal and Error.** Facts determined and findings made after rehearing in the Workers' Compensation Court generally may not be redetermined by the Supreme Court on review.
4. **Workers' Compensation: Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of witnesses and the weight to be given to testimony.
5. **Workers' Compensation.** Generally, issues of causation in workers' compensation cases are for determination by the fact finder.
6. **Workers' Compensation: Proof.** In a workers' compensation case, the burden is on the claimant employee to prove by a preponderance of the evidence that the alleged injury or disability was caused by the employee's employment and that such disability was not the result of the progression of the employee's condition present before the employment-related incident alleged as the cause of such disability.
7. **Workers' Compensation: Presumptions.** There is no presumption from the mere occurrence of an unexpected unforeseen injury that the injury was in fact caused by the employment.

8. **Workers' Compensation: Proof.** The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
9. **Expert Witnesses.** The value of the opinion of an expert witness is no stronger than the facts upon which it is based.
10. **Trial: Expert Witnesses.** The trier of fact is not required to take the opinion of experts in regard to causal connection between alleged injury and disability as binding upon it.
11. **Workers' Compensation: Proof.** A workers' compensation award cannot be based on mere possibility or speculation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Glenn A. Pettis, Jr., for appellant.

Melvin C. Hansen and Kevin J. Dostal, of Hansen, Engles & Locher, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Mutual of Omaha brought this action in the Nebraska Workers' Compensation Court naming its employee Raymond Broussard as the defendant. Plaintiff sought a determination of the rights and liabilities of the parties resulting from an alleged accident occurring on November 25, 1985. From a determination by that court on rehearing that the defendant was not entitled to any further benefits, Broussard has appealed. We affirm.

On November 25, 1985, while in a bent-over position attempting to slide or push a box of computer listings weighing approximately 100 pounds, Broussard experienced sharp pains in his lower back and legs. The incident occurred at Mutual of Omaha during the course of Broussard's employment as a research mathematician. Broussard was earning an average weekly wage of $337.34 and was working 40 hours a week.

Broussard has a history of back problems. The first injury to his back occurred in June 1978 while he was serving in the National Guard as a medic. As Broussard was assisting in the unloading of a patient from an ambulance, another medic dropped her part of the litter. He caught the patient, taking the

full brunt of the weight on his shoulders and lower back muscles. He felt a sharp pain in the lower back radiating down both legs, reported the incident, and was treated with decreased activity.

On January 8, 1983, again while serving in the National Guard, Broussard hurt his back. On this occasion, Broussard injured his back lifting a table while setting up a classroom. He reported the incident and received treatment consisting of medication, bed rest, and heat. Broussard states that it took about 3 months to get over the residuals of this injury.

On August 7, 1983, another incident of back strain occurred in connection with his military service. Broussard was giving a training exercise as part of a physical training session. While doing trunk twisters, an exercise requiring a person to lie on one's back, place one's legs into the air, and move the legs at 180° angles from side to side, he again suffered back pain. He reported the incident and received medication and bed rest. The effects of this injury lasted only a couple of days.

On August 4, 1984, there was another episode of back pain. Broussard was helping his wife unload clothes from the washer into the dryer when the injury occurred. He went to a Veterans' Administration (VA) hospital, received medication to last 4 or 5 days, and underwent physical therapy for a couple of months.

Found in the record is a VA medical certificate dated September 5, 1984. That document describes treatment for back and leg pain, noting that Broussard had painted two rooms prior to the onset of the constant pain. The diagnosis was recurrent lower back strain.

On October 2, 1984, Broussard requested the VA provide him a note stating that he was unable to return to military duty because of back problems.

In March of 1985, Broussard sustained another back injury while playing golf. A Dr. Horrocks treated him for this injury. The medical record for this treatment states that Broussard has "a 9 year history of disc disease, primarily involving radiculopathy on the right down the proximal posterior leg. Probably representing compression at L-5-S-1."

There is a notation in his medical records dated May 21, 1985, in response to a reevaluation of his back pains. That entry

notes lower back pain for 10 years and that the patient still feels pain if he twists his body and is otherwise normal, with no recent injury.

In July 1985, Broussard and his wife moved some railroad ties in their yard. The next morning he awoke with excruciating pain and went to a hospital emergency room. The diagnosis made by the treating physician at the hospital was "acute low back strain - Poss. disc syndrome." He was given medication, treated with bed rest, and told to see his family physician, and the following week received an injection of Kenalog and Xylocaine.

Broussard's wife described another incident of back pain occurring during the summer of 1985. She stated that Broussard was "unloading" in their apartment, called her for help, and complained of muscular pain in his back.

During this period of time, Dr. Horrocks had noted in his records on at least two occasions the possibility of chymopapain injections. A CT scan was taken of the lumbar spine around July 15, 1985, which scan was normal.

Following the November 25, 1985, incident at work, Broussard was treated by a Dr. Wampler, who noted that the incident of moving the box was not the only cause of Broussard's condition and that his past history of muscular back injuries was a contributing cause.

Broussard's family physician recommended that Broussard see Dr. Ray, an orthopedist. Both a CT scan and an MRI were conducted. The CT scan was normal; however, the MRI suggested disk herniation at the L-5 level. A chymopapain injection was done on February 11, 1986. However, that treatment was not successful. In April 1986, a Dr. Hacker performed a microdiskectomy, which gave Broussard relief from the pain caused by the chymopapain injection, but did not give him complete relief.

Broussard's lawyer then referred Broussard, in December 1986, to Dr. Fitzgibbons, an orthopedist. In his report, Dr. Fitzgibbons detailed the medical treatment given Broussard following the alleged incident of November 25, 1985. The only reference to the recurring nature of Broussard's back problem existing prior to that date was a statement that "[i]n 1978,

apparently he had a history of some back problem, but he recovered from this apparently reasonably well." Finally, the physician concluded with this comment: "In regard to the cause of the patient's symptoms, they *appear* to be caused by the incident at work on the 23 November 1984 [sic]." (Emphasis supplied.) It should be noted that Dr. Fitzgibbons on two other occasions in this report provided dates which were off by a period of 1 year. Dr. Fitzgibbons estimated Broussard's impairment "is going to be somewhere between 10 and 20 percent of the body as a whole."

Broussard has also undergone examinations in connection with his military service and request for disability benefits, receiving a 20-percent service-related disability rating and discharge from military service.

Following a rehearing before a three-judge panel of the compensation court, an order of dismissal was entered. As a part of that order a finding was made that Broussard had testified to incidents involving significant injuries to his back starting in 1978 and again in 1983, 1984, and 1985, which imposed upon Broussard an enhanced burden of proof.

The court went on to point out that Dr. Fitzgibbons was the only medical expert who suggested that the symptoms which he found on December 16, 1986, "appear to be caused by the incident at work of November 23, 1984 when he bent over to push a box at Mutual of Omaha." (Emphasis supplied.) However, the court also pointed out that the only history of prior injury which Dr. Fitzgibbons had was the 1978 military injury from which, according to the physician, Broussard apparently had recovered reasonably well.

Accordingly, the compensation court, citing *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981), stated that the value of the opinion of an expert is no stronger than the facts upon which it is based and then concluded: "The medical evidence presented by the defendant is not sufficient to sustain his burden of proof and his claim for disability and all other benefits for which he may have been entitled . . . should be dismissed."

The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury

verdict in a civil case and will not be set aside unless clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1988); *Schlotfeld v. Mel's Heating & Air Conditioning, ante* p. 488, 445 N.W.2d 918 (1989). In testing the sufficiency of evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *LaPage v. City of Lincoln, ante* p. 576, 446 N.W.2d 738 (1989); *Schlotfeld, supra.* Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of the facts for that of the Workers' Compensation Court. *LaPage v. City of Lincoln, supra.* As the trier of fact, the Workers' Compensation Court is the sole judge of witnesses and the weight to be given to testimony. *Id.* Issues of causation are for determination by the fact finder. *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983).

In a workers' compensation case, the burden is on the claimant employee to prove by a preponderance of the evidence that the alleged injury or disability was caused by the employee's employment and that such disability was not the result of the progression of the employee's condition present before the employment-related incident alleged as the cause of such disability. See *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988).

There is no presumption from the mere occurrence of an unexpected unforeseen injury that the injury was in fact caused by the employment. Neb. Rev. Stat. § 48-151 (Reissue 1988); *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988). The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. *Fees v. Rivett Lumber Co., supra.* See, also, *Spangler v. State, ante* p. 790, 448 N.W.2d 145 (1989).

The key to a determination of this appeal is the expert testimony.

> "[U]nless the character of an injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony; and

> that *where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science.* Such a question must necessarily be determined from testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony the causal connection between the alleged injury, the employment, and the disability.

(Emphasis in original.) *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 298-99, 417 N.W.2d 164, 167 (1987).

The compensation court expressly considered the statements of Drs. Wampler and Fitzgibbons. In respect to Dr. Fitzgibbons' statement, the court noted the previously mentioned deficiencies regarding the extent of his knowledge as to the history of Broussard's difficulties relating to his back. The court went on to correctly cite *Riha, supra*, for the proposition of law holding the value of the opinion of an expert is no stronger than the facts upon which it is based. This led to the conclusion that Broussard had failed to satisfy his burden of proof.

This court has consistently held that the trier of fact is not required to take the opinion of experts in regard to causal connection between alleged injury and disability as binding upon it. *Tatara v. Northern States Beef Co.*, 230 Neb. 230, 430 N.W.2d 547 (1988); *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983).

However, Broussard contends that the statement of Dr. Fitzgibbons is binding and points to *Mann v. City of Omaha*, 211 Neb. 583, 319 N.W.2d 454 (1982), in support of this contention.

Mann is clearly distinguishable. In that case there was no question as to the credibility given to the testimony of two doctors who testified that stress was the cause of the heart attack for which the claimant, a police officer, sought benefits.

In the instant case the testimony of Dr. Fitzgibbons was not based on firsthand knowledge and was based on an incomplete

history which omitted several serious back episodes between 1978 and Broussard's alleged November 25, 1985, injury. The extensive preexisting condition of acute back strains of Broussard received only a cursory reference to a single injury that occurred in 1978 from which, the doctor states, Broussard recovered "apparently reasonably well." That, of course, was not accurate. Additionally, the conclusion of causation was not expressly made with a reasonable degree of medical certainty.

In summary, Broussard has not sustained his enhanced burden of proof with sufficient medical testimony on the issue of causation. A workers' compensation award cannot be based on mere possibility or speculation, and if an inference favorable to Broussard can only be reached on that basis, then he cannot recover. *McMichael v. Lancaster Cty. Sch. Dist. 001, ante* p. 603, 447 N.W.2d 35 (1989).

Considering these deficiencies and being mindful that credibility and the weight to be given testimony, and the issue of causation generally, are all matters of fact to be determined by the compensation court sitting as the finder of fact, *Tatara, supra*, we cannot say that the decision of the compensation court was clearly wrong.

The judgment of the compensation court is affirmed.

AFFIRMED.

CYNTHIA LOU VANCE, APPELLANT, V. LANCE LEONARD VANCE, APPELLEE.

448 N.W.2d 605

Filed December 1, 1989. No. 89-382.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellant.

Lawrence H. Yost, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The marriage of the petitioner, Cynthia Lou Vance, and the respondent, Lance Leonard Vance, was dissolved on September 5, 1985. Custody of Desirae, the minor child of the parties, born January 25, 1983, was placed in the court, with physical custody granted to the respondent and visitation granted to the petitioner.

On August 3, 1988, the petitioner filed a petition to modify the judgment so as to award custody of Desirae to the petitioner. The matter was heard on March 23, 1989. The trial court found that the petitioner had failed to prove there had been a change of circumstances indicating that the respondent was unfit to have custody of the minor child or that the best interests of the child required that custody be awarded to the petitioner. From that judgment the petitioner has appealed.

Child custody is initially entrusted to the discretion of the trial court. When the trial court has retained legal custody of a child, any change in physical custody is to be determined by the best interests of the child. *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

From our de novo review of the record, we conclude that the evidence supports the findings of the trial court and that there has been no abuse of discretion in finding that custody of the child should not be awarded to the petitioner. The judgment is, therefore, affirmed.

AFFIRMED.

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